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Supreme Court, U.S.
FILED

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No. ________

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In The

Supreme Court of the United States

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ROBERT MARSHALL WENZEL,

Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY
KENNETH STEVEN APFEL,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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May 6, 1999

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QUESTIONS PRESENTED FOR REVIEW

Whether the Commissioner's denial of the petitioner's disability was supported by substantial evidence, was an accordance of due process of law as mandated by the Constitution of the United States.

Whether the Commissioner's refusal to reopen the petitioner's case was again supported by substantial evidence, was again an accordance of due process of law, was justifiable under the Code of Federal Regulations.

Whether the District Court's dismissal of this case for lack of jurisdiction and the Court of Appeals Panel's affirmance were decisions founded on judicial consideration of the facts and application of the law, were justifiable under the United States Code and the case law.

Whether the Commissioner's conduct in the administrative review process and judicial proceedings asks for the attention of this Court.

Whether the District Court and the Panel's decisions have set at naught this Court's relevant decisions.

Whether the District Court and the Panel's proceedings have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of this Court.

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PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR A SUMMARY REVERSAL

Robert Marshall Wenzel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, and requests a summary reversal of its decision therein.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing (App. 40) is unreported. The decision of the Court of Appeals affirming the decision of the District Court (App. 38) is reported at 162 F.3d 1171. The decision of the District Court dismissing this case for lack of jurisdiction (App. 27) is unreported.

JURISDICTION

On February 8, 1999, the Court of Appeals denied the suggestion for rehearing en banc and the petition for rehearing by the Panel. *See* Ninth Circuit Rule 35-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const., Amend. 5 (App. 41).

42 U.S.C. § 405(g) (App. 42).

20 CFR Ch. III §§ 404.988 and 404.989 (at 24 infra).

STATEMENT OF THE CASE

1. Introduction

Petitioner Wenzel, on March 7, 1968, on a river patrol boat in the Ben Tre Canal, was injured by a B-40 rocket. He sustained a shearing of the upper left leg, a broken femur, a severed artery, a ruptured eardrum, and a knee-to-cheek embedment of shrapnel. He was hospitalized for thirteen months, and received Social Security disability benefits for the last seven. Wenzel's Narrative, Pl. Ex. 17 (App. 125), contains the 1968-93 chronology. This Statement includes, and as necessary more fully describes, the relevant events.

2. The Administrative Law Judge's Hearing Decision

Wenzel, on March 18, 1974, unaccompanied by counsel, appeared before ALJ William H. Yim for a hearing. The ALJ, on May 21, 1974, issued his Hearing Decision, Pl. Ex. 1 (App. 3).

3. The ALJ's "Measure" of "Non-disability"

> The Claimant appears well-advised in his plans to enter college to take journalism. He seems certain for success, particularly in that field. But if he can go to college, he can do a desk job. Even though that would be a waste, it is a measure which indicates his non-disability for Social Security purposes (App. 13 and 14).

4. The Appeals Council's Action

> Your request for review of the administrative law judge's decision has been carefully considered by the Appeals Council . . .
>
> The Appeals Council has concluded that this decision is correct . . . Accordingly, the administrative law judge's decision stands as the final decision of the Secretary in your case (Action of October 2, 1974: Pl. Ex. 2, App. 16).

Wenzel believed that the measure of the administrative law judge would not have been set forth had there not been basis for it in the administrative law. He understood the measure to be not other than an explicit settling of his case, a summary foreclosing of any possibility of a successful administrative review or court action. He was then going to college, intended to continue, and did so for the next five years (App. 126, 127, 150, 151, 152): he did not file a timely request for administrative review; he did not file a timely court action.

5. Wenzel's Disability Report

Wenzel, on August 1, 1988, filed a Disability Report, Pl. Ex. 4 (App. 104). His submission did not seek retroactivity (he had not yet reread the Hearing Decision); it did not refer to any prior SSA proceedings. It acknowledged that he did not meet the earned income requirement for the decade preceding the year in which he last worked; it asked for consideration of the fact that he had been in a vocational-rehabilitation program for three of the ten years.

His submission was tendered at that time because he had then, on account of excessive activity, or unstable shrapnel, or ageing process, or some combination thereof, been back on the crutches for a time. His reckoning was that the matter of the "measure" of "non-disability" was then sufficiently distant: it had been nine years since he had gone to college. His problem was that it had been eight years since he had gone to work.

6. The Office of Disability Director's Disapproval

> We have determined that you are not entitled to disability benefits. The reason you are not entitled is that you do not meet the earnings requirement of the law at the time you state you became disabled or at any later date.
>
> It is important for you to know that we have not made any determinations as to whether or not you are disabled within the meaning of the law. Since you do not meet the earnings requirement,

> it has not been necessary to decide whether you meet the disability requirement (Notice of Disapproved Claim of August 14, 1988: Pl. Ex. 5, App. 18).

Wenzel recognized the Catch-22 here: if he did work, he would have no basis for a claim; if he did not work, he would have no status for a claim. What, however, to do? Request reconsideration of the consideration he had already requested and been denied? He could not see here (he had not yet reread the Hearing Decision) that he was other than caught: he did not request reconsideration.

7. Wenzel's Narrative, the First Showing of Error on the Face of the Evidence

Wenzel, on May 1, 1992, sent the director a letter and a Narrative (he had reread the Hearing Decision) that pointed out what the reread document itself revealed: the ALJ's unrealizing establishment of a listed impairment, chronic venous insufficiency. The letter asked for the correction of error, this quite openly intentional (App. 146 and 147), on the face of the Hearing Decision's medical evidence declared "in evidence" (App. 12 and 13).

8. The Director's Letter

> Our records show that you were allowed a closed period of disability for the period of October 1968 through May 1969 and terminated June 1969.
>
> Our records further show that you last met insured status March 31, 1977. There is nothing to show that the information in our letter to you dated August 14, 1988 has changed the decision in that letter (Letter of July 13, 1992: Pl. Ex. 6, App. 20).

The director who had managed within two weeks to find that Wenzel's not meeting the earnings requirement sufficed for the disapproval of his Disability Report now needed ten to find that the requirement was as well invocable for his letter and what was not to receive so much as mention, his Narrative. Thus, "There is nothing to show. . . . " No SSA official, from that time to this, has done other than refuse to address what the Hearing Decision shows. Not one has acknowledged the existence of the Narrative that marks out what it shows.

9. Wenzel's Petition for a Reopening or an Extending of Time for Filing a Court Action

> I ask that you consider, reference the Code of Federal Regulations, whether this action [the ALJ's making of school attendance a "measure" of "non-disability"] was misleading. I submit that this was good cause for my not filing a timely action.
>
> I ask that you consider, reference the United States Code, whether this Hearing Decision, one an Appeals Council "carefully considered" "correct," is, in and of itself, conclusive evidence of error on the face of the evidence, of error *plainly intentional* – of gross abuse of discretion.
>
> I ask that you consider, reference the Constitution of the United States, whether I was denied due process of law.
>
> I declare, under penalty of pertinent law, that I have made a true representation to the Appeals Council.
>
> [Signed and dated.]
>
> Enclosures
>
> ALJ William H. Yim's May 21, 1974 Hearing Decision
>
> Appeals Council's October 2, 1974 Action

> My September 30, 1995 Narrative
>
> My 1962-63 and 1967-68 service records (Petition of September 30, 1995: Pl. Ex. 16, App. 157 and 158).
>
> **10. The Appeals Council's Order**
>
> In accordance with Social Security Administration regulations, the Appeals Council may, where good cause is shown, extend the time in which to commence a civil action (20 CFR 404.982-911).
>
> From its review of this case, the Council notes that you received the denial notice timely and you were aware of the 60-day time limit for filing a civil action. Your contention that you did file [sic] a civil action because you believed the Administrative Law Judge's decision was correct and you now are of the opinion the decision was incorrect does not constitute good cause to extend the filing limit for filing a civil action, in accordance with the above-cited regulations. Moreover, contrary to your assertion, the Administrative Law Judge's consideration of your ability to attend college is required by section 404.1529 which requires the consideration of daily activities in assessing the credibility of an individual's subjective complaints.
>
> After carefully considering the circumstances in this case, the Appeals Council is not persuaded that good cause for an extension of the time in which to commence a civil action has been shown. The request is, therefore, denied (Order of March 6, 1996: Pl. Ex. 24, App. 22).

The Appeals Council that would not for five months respond to the Petition then did so only because Wenzel had written to a special assistant to the President (Letter and Attachment of January 8, 1996: Pl. Exs. 19, 20, App. 159, 160, 161, 162, 163), who wrote to the SSA chief of staff.

The Appeals Council that would falsely construct "Your contention" simply joined what Wenzel "believed" in the Petition's third paragraph to what a 1974 Appeals Council considered "correct" in its fifth (App. 157 and 158).

The Appeals Council that would not speak to the ALJ's self-evident considerations of altering, synonymizing, and expunging evidence that indicated a listed impairment, would not speak to the ALJ's establishment of that which he denied, would speak to the ALJ's requisite consideration: this toward an assessment of "the credibility of an individual's subjective complaints."

The Appeals Council of an agency that provides benefits and funding for school attendance for a substantial number of those it has assigned "disability" would now attempt to defend an ALJ's making of school attendance a "measure" of "non-disability."

11. The District Court Proceedings

Wenzel, on November 15, 1996, as plaintiff pro se in Case CV-S-96-01063-HDM-(LRL) in the United States District Court for the District of Nevada, filed Complaint.

Wenzel, on January 15, 1997, the SUMMONS of a United States District Court having simply been ignored by the Commissioner of Social Security, filed Motion for entry of default.

The Commissioner, on January 16, 1997, proffered Stipulation for Extension of Time to Answer (App. 46 and 47), the extension sought "due to a delay in the preparation of the Administrative Records and suggested Answer to the Complaint." (Wenzel assented.)

The District Court, on February 10, 1997, because Wenzel's copy of the Motion for default received by the U.S. Attorney was addressed to her, was not addressed to her Civil Process Clerk, entered ORDER (App. 24) denying the Motion.

The Commissioner, on March 6, 1997, filed Motion for Remand (App. 48), wherein "The Appeals Council wishes to take further administrative action in this case" (App. 50), wherein "voluntary" remand was sought in order to find Wenzel's "missing" claim file (App. 51).

Wenzel, on March 14, 1997, filed Response to Motion for remand, which asked for a denying of remand.

The District Court, on April 21, 1997, entered ORDER (App. 25) granting remand.

The Commissioner, on September 17, 1997, filed Motion to Dismiss Plaintiff's Complaint (App. 53), this incorporating Points and Authorities *Statement of Facts,* wherein was made known the fact that what had been "missing" six months earlier was now "destroyed" (App. 55); and Declaration of Wilbur J. Laub, wherein the Chief of Court Case Preparation and Review Branch 1 acknowledged (App. 66) that in fact he held what was rendered a reconstruction and presented as Def. Ex. 5 (App. 70): Wenzel's Disability Report.

The Commissioner concurrently filed Motion to Vacate this Honorable Court's ORDER of April 24 [sic], 1997, and to Reopen the Instant Civil Action (App. 85).

The District Court, on November 4, 1997, entered ORDER (App. 26) vacating remand, and giving Wenzel sixteen days from that day to file a response to Motion to dismiss.

Wenzel, on November 14, 1997, concurrently filed Response to Motion to dismiss and Motion for decision on the merits of this case.

The District Court, on February 24, 1998, entered ORDER (App. 27) granting Motion to dismiss this case.

12. The Commissioner's Points and Authorities *Statement of Facts,* and Declaration of Wilbur J. Laub

> On May 21, 1974, an Administrative Law Judge issued a decision finding that the Plaintiff is [sic] not under a disability (Exhibit 3 of Declaration (pages 7ff are unavailable)). On October 2, 1974, the Appeals Council denied Plaintiff's request for review of that decision. Although advised of the right to commence a civil action within 60 days of receipt of the notice, such action was not commenced (Exhibit 4 of Declaration) (App. 56).

The Commissioner's modus operandi, well-nigh mesmerizing in the beauty of its simplicity, would be in the judicial proceedings what it was in the administrative review process. Make mention of the procedural: an ALJ denied disability; make no mention of the substantive: an ALJ at once established what he denied.

What an ALJ did do in place, what Wenzel within sixty days did not do is then the only issue at hand. The modus developed: if there is no need for consideration of substantive fact, then there is no need for consideration of relevant law, such as the one that provides for the Commissioner's tolling of filing periods, 42 U.S.C. § 405(g).

How did the Commissioner happen to have the Hearing Decision (Def. Ex. 3)? Have this particular document from "the official files" of Wenzel's 1972 claim, these then "unavailable," indeed, "destroyed"? Have that from what was in the fourth month of judicial proceedings reported "missing" and in the tenth reported "destroyed"?

The Commissioner does not say in "Points," nor does the Chief say in "Declaration," just when these official files were destroyed. Just when, on whatever date, will but affirm one of two possibilities: there was false representation to a United States District Court or there was destruction of evidence during its proceedings.

The Commissioner happened to have the Hearing Decision, less one page that was "unavailable," received (with Wenzel's Petition) by the Appeals Council. What page was now the missing page? The one with the ALJ's signature.

What is also missing, in the Commissioner's recital of the procedural facts that an ALJ denied disability and an Appeals Council denied review, is mention of what was stated by the Appeals Council: its denial was a "final decision." What is missing is what would be somewhat harmful to his argument that indeed there has been no "final decision."

> The Plaintiff has failed to exhaust his administrative remedies with respect to his claim for benefits and, therefore, there has been no "final decision" of the Commissioner as contemplated by Section 205(g) of the Act, 42 U.S.C. § 405(g) (App. 55).

Just where the plaintiff failed to exhaust his administrative remedies:

> On August 2, 1988, Plaintiff filed his third application for disability insurance benefits, alleging onset of disability commencing March 12, 1980 (Exhibit 5 of Declaration). This application was denied by notice dated August 14, 1988. Although advised of the right to request reconsideration of the determination within 60 days of receipt of the notice, such request was not made. Plaintiff was also advised by notice dated June 27, 1988, that he is [sic] ineligible for supplemental security income benefits (Exhibit 6 of Declaration) (App. 56).

The Commissioner who would refuse to acknowledge the District Court's SUMMONS for two months, who would then need an extension of two months, who would then need a remand of six months, who would need ten months to find something that might provide a basis for an argument, would find that something in what he had by then known for nine years: Wenzel had not requested reconsideration of the disapproval of his Disability Report.

Concerning the above four statements in the Commissioner's *Statement of Facts,* last first. Wenzel has never applied for SSI: it is neither mentioned nor alluded to in anything ever received from him by the Commissioner. The fact that he has never applied, a matter of nonrecord, becomes elsewhere, in a certain expedient Reconstruction (App. 73), by a forgetful reconstructor, a matter of record.

The unsigned "notice dated June 27, 1988" is nonsensical even in its date: Wenzel had no communication with the SSA from October of 1974 to August of 1988. (A number of things in this particular venture of the Commissioner went awry: the director's disapproval of the Disability Report is his Exhibit 6; the fabrication dated June 27, 1988 – App. 83 – is not labeled as an Exhibit.)

Wenzel's Disability Report (App. 104) does not allege disability commencing March 12, 1980. It unequivocally states (App. 105 and 106) what his medical record and work-history (not to mention an ALJ's Hearing Decision) unequivocally show: his disability did not commence in March of 1980, it commenced in March of 1968.

The Commissioner's Disability-Report reconstruction, this proffered when he knew that the original had been received as Pl. Ex. 4 by the District Court, when indeed the original was acknowledged to be held by an unmindful Chief, the reconstruction replete with a photostatic imposition of Wenzel's signature (App. 81), is the Commissioner's attempt to make this case two cases: to then make all turn on one.

The one to serve as pivot is the one in which there is the second showing of what Wenzel within sixty days did not do. If there has been no exhaustion of administrative remedies in, then there has been no "final decision" in, the second case. Does this not indeed invalidate the "final decision" in the first?

Regarding whether there were in fact in the second any administrative remedies to exhaust, Wenzel's not requesting within sixty days reconsideration of the disapproval of his Disability Report revisited. He did not request reconsideration of the consideration he had already requested (App. 123) and, within two weeks and without so much as its mention, been denied (App. 18). He was accorded one, and only one, consideration: "[Y]ou do not meet the earnings requirement of the law."

Wenzel, in his Disability-Report acknowledgment that he did not have insured status, asked for consideration of what he believed to be the considerable aspect of his nonstatus, did not ask for a conferment of retroactive status. That aspect summarily denied consideration, the only thing that he could have asked for in a request for reconsideration would have been a conferment.

The Commissioner who would so confer would have broken the law; the claimant who would ask him to do so might well have. Thus, the character of the Commissioner's ten-months-in-the-finding basis for an argument, Wenzel's failure to exhaust his administrative remedies.

Does the Commissioner's argument indeed make two cases, with the second's "no final decision" rendering inoperative the first's "final decision"? There is the Commissioner's answer in April of 1996, and there is his answer in September of 1997.

The Commissioner who would not, in March of 1996, in his Order denying reopening, find it necessary to attempt to make two cases, to even make mention of what was and was not done over August-October of 1988:

> On March 6, 1996, the Appeals Council denied a request for an extension of time to file a civil

> action and a request for reopening. The Council has now received your letter dated March 18, 1996.
>
> The Appeals Council considered the contentions raised in your letter but concluded that these contentions do not provide a basis for vacating its previous action in this case.
>
> The Council has decided there is no basis to grant the request for an extension of time to file a civil action nor is there any basis for reopening the hearing decision dated May 21, 1974. Accordingly, that decision stands as the final decision of the Commissioner on the application dated September 13, 1972 (Letter of April 15, 1996: Pl. Ex. 29, App. 23).

The Commissioner who would, in September of 1997, in his Motion to dismiss, find it necessary:

> The Plaintiff herein has failed to pursue and exhaust those remedies with respect to his claim for benefits provided by the Act and Regulations promulgated thereunder as set forth above.
>
> Since there has been no hearing before an Administrative Law Judge in this case, no "final decision" of the Commissioner has been rendered. Thus, there is no decision subject to judicial review. . . . [Citations omitted.]
>
> This need for administrative exhaustion and strict application of Section 205(g) of the Act was clearly upheld in the case of *Califano v. Sanders,* 430 U.S. 99, 108 (1977) (App. 61).

13. The District Court's ORDER of Dismissal

> This is an action pursuant to 42 U.S.C. sec. 405(g) and 42 U.S.C. sec. 1383(c) for judicial review of the denial of the plaintiff's claim for

> benefits under Title II of the Social Security Act. This matter is before the court on defendant's motion to dismiss for failure to exhaust administrative remedies (#10) (App. 28).

The District Court, in its first sentence on its first page, in making successful the Commissioner's venture to insert SSI into this case, discloses what is manifest right through to its last on its last: it would not be bothered to make so much as pretension to judicialness.

What would be the District Court's response to having been shown, in Wenzel's Complaint and thirty-three Plaintiff Exhibits, to having again been shown, in the Commissioner's profferings, the latter's modus operandi? Its response would be to take the modus, entire, and make it its own.

The ORDER of dismissal will take the structure of the Motion to dismiss, right down the line, and make it its own. The facts as stated by the District Court will be, except for one, the facts as stated by the Commissioner. Indeed, the very language of the one will seldom stray from close paraphrase of that of the other.

The District Court will, in *"Administrative Proceedings,"* recite the record. Its record will include, as a verifying (the word of its preeminent authority sufficing) of a certain entering, this entry: "On June 27, 1988, the administration notified Wenzel that he was ineligible for supplemental security income benefits" (App. 29).

It will next, in *"Discussion,"* cite "in pertinent part" Section 205(g) of the Social Security Act.

> Any individual, after any *final decision* of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced *within sixty days* after the mailing to him of notice of such decision or within such further

> time as the Commissioner of Social Security may allow (App. 30).

The District Court will see as pertinent part this section's first sentence, to which it supplies emphasis; it will not see as pertinent part its fifth, in which abides a certain corollary: "The findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive. . . . "

It will then allocate one of its six pages to a discussion of what is and is not a final decision. Just why the District Court would see this as necessary is not readily apparent: it will, on its next page, find that in this case there both is and is not a final decision.

The District Court will here, Section 205(g)'s first sentence at hand, repeat *Administrative Proceedings'* received operative facts. It will, the procedural elements of the facts and the pertinent part of the law in place, render judgment.

> On the second application, Judge Yim found that the plaintiff was not under a disability. On October 2, 1974, the Appeals Council denied a Request for Review, which then became the administration's final decision. The plaintiff had 60 days from the date he received notice of the decision to seek judicial review. Because the plaintiff failed to file a complaint within the specified time period, he is barred from seeking judicial review of that decision (App. 31).

It will now, in its one departure from the Commissioner's script, find that there is a final decision (it will, in its next paragraph, find that there is not a final decision). No matter: Wenzel is barred, and there is no need to provide precedent for the barring, from seeking judicial review of the final decision.

The fact of error on the face of the evidence? The regulations that directly speak to such fact? The law whose fifth sentence's corollary is that the findings of the

Commissioner as to any fact, if not supported by substantial evidence, shall not be conclusive? The case law established by long-standing decisions of the Supreme Court that provide definitive precedent for the judicial tolling of filing periods?

If the substantiveness of the first question is not allowed ("Judge Yim found that the plaintiff was not under a disability"), then there is no first question and there are no further questions. If there is no allowance of substantive fact, then there are no pertinent parts of regulation, law, and case law.

If, however, there is procedural fact, then there is indeed pertinent case law:

> On Wenzel's third and final application, the administration made the initial determination that he did not meet the earnings requirement under the Social Security Act. Although the plaintiff was advised of the right to file a Request for Reconsideration at the time the administration denied his application, he failed to do so. Thus, there is no "final decision" of the Commissioner. Because the plaintiff failed to exhaust his administrative remedies, this court is without jurisdiction to review the administration's decision. *Hoye v. Sullivan,* 985 F.2d 990, 991 (9th Cir. 1992) (App. 32).

The District Court will, in its return to its guide, find that there is not a "final decision." It will do so when it knows the fact: the only administrative remedy available to the plaintiff had been requested and denied, had been exhausted; when it knows the law: the requirement that administrative remedies be exhausted, one of the two elements in the final decision requirement, is the one that, toward District Court jurisdiction, can be equitably tolled. It will, in a case where a claimant "refused to appear at a scheduled hearing" (*Hoye* at 990), find precedent for its misstating of both fact and law.

> The plaintiff also seeks judicial review of his petition to re-open his case or, in the alternative, an extension of time within which to file a court action. In an order, dated March 6, 1996, the Appeals Council denied both of plaintiff's requests. The plaintiff cannot seek judicial review of this decision. In *Califano v. Sanders*, the Supreme Court held "an interpretation that would allow a claimant judicial review simply by filing - and being denied - a petition to re-open his claim would frustrate the congressional purpose, plainly evidenced in section 205(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision denying [sic] the initial claim for benefits." 430 U.S. 899 [sic] 108.
>
> Accordingly, the defendānt's motion to dismiss is granted (App. 32).

The District Court will, in its close, see as pertinent part one sentence in *Sanders'* seven pages. It will do so when it knows that this sentence and the one following are a specific address to repetitive filings of frivolous petitions to reopen; when it knows that the Supreme Court's close, this directly following the address invoked, reemphasizes that judicial review of a denial of a petition to reopen, when there is a colorable constitutional claim, is not barred: it is presumed.

It will not see as pertinent parts two sentences at 983 of *Sanders*. The claimant had not, it was found in his first claim, "demonstrated a relevant disability of sufficient severity." Nor could he in his second. The ALJ who then denied reopening, whose findings were not seen by the Supreme Court as controversial, had concluded that there was no new and material evidence, that there were "no errors on the face of the evidence."

This claimant's demonstration of an establishment of a listed impairment in a Hearing Decision: of error on the face of the evidence? (It does not matter if it is not mentioned.)

14. The Court of Appeals Proceedings

Wenzel, on June 18, 1998, as appellant pro se in Case 98-15857 in the United States Court of Appeals for the Ninth Circuit, filed Informal Brief.

The Commissioner, on July 9, 1998, filed Brief (App. 87).

Wenzel, on July 22, 1998, filed Reply Brief.

The Court of Appeals Panel, on October 26, 1998, entered MEMORANDUM* affirming the District Court's dismissal. *Footnote: "This disposition is not appropriate for publication. . . . " (App. 38).

Wenzel, on December 10, 1998, filed Petition for Rehearing With a Suggestion of Appropriateness of Rehearing En Banc.

The Panel, on February 8, 1999, entered ORDER rejecting suggestion and denying rehearing (App. 40).

15. The Commissioner's Brief

The Commissioner runs to the fore twenty 20 CFR Chapter III regulations, §§ 404.988 and 404.989 not in the running. He will come no closer than § 404.968, in the pertinent twenty, to the nonpertinent two (App. 90).

He cites sixteen pertinent, when not indeed analogous, cases, *Weinberger v. Salfi, Mathews v. Eldridge,* and *Bowen v. City of New York* in the citing. (Not to mention *Califano v. Sanders* and *Hoye v. Sullivan*) (App. 89).

The Commissioner's argument before the Court of Appeals is in the main a belaboring of the one before the District Court. The one variation is that he does here defer to the District Court, in the one instance of role-reversal, in allowing that there is, at the same time averring that there is not, a "final decision."

The one addition is that he does now make mention of what he did not make mention of to the District Court (the Commissioner's nonmention quite sufficient for the District Court's nonmention), the matter of whether or not Wenzel has a constitutional claim. The Commissioner will now say that Wenzel has no such claim.

> This Court, in applying the rule enunciated in *Califano v. Sanders,* has held that in circumstances virtually identical to those presented in this case, a district court has no jurisdiction to review the Secretary's discretionary refusal to reopen a claim which has become administratively final, to consider an untimely request for review or to grant an extension of time to seek review unless a colorable constitutional violation is alleged. [Citations omitted.] Plaintiff's due process claim (at p. 4 [sic] of his informal brief) is totally without any substantiation and is entirely meritless. Thus, the constitutional claim clearly is not colorable and "is made solely for the purpose of obtaining jurisdiction." *Hoye v. Sullivan* . . . at 991-992. Accordingly, the district court's action dismissing the civil action for lack of jurisdiction was correct and consistent with the caselaw of this Circuit (App. 99).

16. The Panel's MEMORANDUM of Affirmance

> Robert M. Wenzel appeals pro se the district court's dismissal for lack of subject-matter jurisdiction of his appeal from the Commissioner's denial of Wenzel's September 1972 application for disability benefits and his motion to reopen his disability application for that year. We have

> jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *see Evans v. Chater,* 110 F.3d 1480, 1481 (9th Cir. 1997), and we affirm.
>
> Because Wenzel's attempt to seek judicial review of the Commissioner's denial of his September 1972 application for disability benefits was untimely, the district court properly concluded that it lacked subject-matter jurisdiction over this claim. *See* 42 U.S.C. § 405(g) (App. 38).

The Panel will not, right after the operative modus of the Commissioner and the District Court, address the fact that it has been shown, that the findings of the Commissioner in the September 1972 application that resulted in the May 1974 Hearing Decision were not just unsupported by substantial evidence: they were, however inadvertently, patently confuted in the Hearing Decision. (The Commissioner and the District Court would, as procedural fact, make mention of the Hearing Decision; the Panel will show them how it ought to be done: make no mention.)

It will, per the expedient modus, address the fact that the seeking of judicial review was untimely, will then advise on what ought to be seen. Does it matter that § 405(g) speaks to both of the facts? That there is no law or case law that provides for the waiving of the one? That there is case law that provides for the waiving of the other? (Not if the one is not mentioned.)

> Because the Commissioner's denial of Wenzel's motion to reopen his 1972 application for benefits was not a final reviewable order under § 405(g), the district court also correctly dismissed this claim. *See Evans* . . . at 1482 (App. 39).

The Panel that will not mention what was in 1974 (this being reaffirmed in 1996) a "final decision" will mention what was not (in 1996) a "final reviewable order," will then point to what needs to be seen. The term is not to be seen in § 405(g): the apropos "final" appears once, the word that follows is "decision." Nor is it to be seen in *Evans*.

Thus does the Panel, here evasively, there terminologically, maneuver: the better to stand clear of the reckoning of the District Court, this then allowed by the heretofore evasive Commissioner, that there both is and is not a "final decision" in this case.

> Moreover, Wenzel failed to raise a colorable constitutional claim to enable the district court to review the denial of his motion to reopen. *See Hoye* . . . [at] 991-992 . . . (per curiam); *cf. Evans* . . . at 1482-84 (concluding that appellant's due process claim, which asserted that he had been denied a meaningful opportunity to be heard, conferred jurisdiction upon the district court to address this claim).
>
> AFFIRMED.[1] (App. 39).

What is to be seen, concerning what Wenzel failed to raise for the District Court, this being what the thoughtful Panel would find for the District Court, what the unthoughtful latter had not found for itself, is the case of Mr. Stewart Hoye, who had his case dismissed because he refused to appear at a scheduled hearing. The case of one who appeared at a scheduled hearing, who received a Hearing Decision flawed in almost every imaginable way? (It does not matter if it is not mentioned.)

What is to be compared is the case in which the Ninth Circuit found that a District Court erred in its conclusion that "it lacked jurisdiction" because "a refusal to reopen was not a final decision under 42 U.S.C. § 405(g)" (*Evans* at 1481), found that "the district court had jurisdiction to consider Evans' constitutional due process claim on the merits" (*Ibid.* at 1483); is the case in which it found that the District Court did not err in its alternative conclusion (perhaps made ready in the event that it did not lack jurisdiction) that Evans had no constitutional due process claim on the merits. (*Evans* at 1483-84).

What is to be compared is the case of Mr. Alton Evans, in which this Ninth Circuit sum and substance:

> The record demonstrates that the Commissioner considered and weighed the medical evidence in reaching her determination. . . . The district court did not err in its alternative conclusion that the Commissioner's refusal to reopen is supported by substantial evidence. (*Ibid.* at 1484).

The case in which the record demonstrates that the Commissioner would not even mention the medical evidence, that his refusal to reopen is not supported by any evidence? (As before.)

What would be given only footnote treatment in the Panel's MEMORANDUM is what had been more prominent in the District Court's ORDER of dismissal, the concocted argument in the Commissioner's Motion to dismiss.

> [1]To the extent that Wenzel contends that the district court erred by dismissing his appeal from the Commissioner's denial of his August 1988 application for disability benefits, we reject this contention because Wenzel failed to exhaust his administrative remedies with respect to this claim. *See Hoye* . . . at 991 (App. 39).

The Panel that reviewed de novo knew, if it reviewed Wenzel's Complaint and the Commissioner's "Points" in his Motion to dismiss, that this was not, to any extent, Wenzel's contention; that this was, to the extent of being the ten-months-in-the-finding basis for his argument, the Commissioner's construction. It knew, if it reviewed Wenzel's Disability Report and its summary Disapproval, what the Commissioner and the District Court knew: that Wenzel had indeed exhausted his one possible administrative remedy.

What would be given rather more prominent place in the Panel's MEMORANDUM of affirmance is what had not been given any place in the District Court's ORDER or the Commissioner's Motion, what had only later taken place in the Commissioner's Brief, what the Panel would then make its centerpiece: "Wenzel failed to raise a colorable constitutional claim. . . . "

The Panel would deal with the issue of Wenzel's constitutional due process claim by simply saying, after the Commissioner, in its NOT-FOR-PUBLICATION MEMORANDUM, that he has none. His having none in place, its precedent is at hand. Not to matter that in the two FOR-PUBLICATION cases that it cites, as in all others, the plaintiffs' having or not having such claim is not simply told, it is requisitely shown.

Thus, the Statement. The basis for federal jurisdiction in the court of first instance is 42 U.S.C. § 405(g).

REASONS FOR GRANTING THE WRIT AND REQUEST

The Administrative Law Judge who in his Hearing Decision (App. 3) denied Wenzel's disability at once, in his presentation of the medical evidence, in his reproduction of "superficial varicosities" and "stasis dermatitis" and "venous ulcer" (App. 12), established, unwittingly enough, Wenzel's listed impairment of chronic venous insufficiency.

> 20 CFR Ch. III, § 404.1520 Evaluation of disability in general . . .
>
> (d) *When your impairment(s) meets or equals a listed impairment in appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

> Appendix 1, Part 404, Subpart P . . .
>
> 4.11 *Chronic venous insufficiency* of a lower extremity. With incompetency or obstruction of the deep venous system and one of the following:
>
> A. Extensive brawny edema; OR
>
> B. Superficial varicosities, stasis dermatitis, and recurrent or persistent ulceration which has not healed following at least 3 months of prescribed medical or surgical therapy.

The ALJ's open tampering with the medical evidence and his making of Wenzel's school attendance an illicit "measure" of "non-disability," these aspects and a number of others marked in Wenzel's Narrative (App. 130-155), make plain that this was an intentional error, that this was a deliberate deprival of due process of law.

> § 404.988 Conditions for reopening
>
> A determination, revised determination, decision, or revised decision may be reopened – . . .
>
> (c) At any time if – . . .
>
> (8) It is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made.
>
> § 404.989 Good cause for reopening
>
> (a) We will find that there is good cause to reopen a determination or decision if – . . .
>
> (3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

The Appeals Council that in its Order (App. 21) denied reopening would not even try to controvert what it had been shown, error on the face of the evidence. It would, while refusing to see and hear, speak:

> On October 2, 1974, the Appeals Council denied a request for review of an Administrative Law Judge's decision on this case. The Council has now received a request for reopening of the decision and, if reopening is declined, a request for an extension of time in which to commence a civil action.
>
> In accordance with Social Security Administration Regulations, a decision may be reopened within specified time limits on the basis of new and material evidence or if the evidence considered in making the decision clearly shows on its face that an error was made (20 CFR 404.987-989).
>
> The specified time limits for reopening a decision are four years from the date of the initial determination. In this case, the initial determination was made over 20 years ago. Clearly, there is no regulatory basis to reopen and revise the initial determination denying your application for a period of disability and disability insurance benefits (App. 21).

The Appeals Council's refusal to address what it had been shown and its false representation of the regulations make clear that this was a calculated deprival of due process of law.

The District Court that dismissed this case for lack of jurisdiction proceeded to its lack by refusing to make mention of the substantive attributes of the procedural facts that Wenzel's disability and reopening of his case had been denied. It then had no reason to make mention of "due process of law" or "colorable constitutional claim" or anything of the kind.

The Court of Appeals Panel that affirmed the dismissal arrived at its decision by refusing to allow the elemental merits that the District Court had refused to allow. It then, prompted by the Commissioner in his

Brief, came to an understood-as-decisive finding in its MEMORANDUM, found for the District Court what that Court, having had no reason, had not found in its ORDER: "Wenzel failed to raise a colorable constitutional claim to enable the district court to review the denial of his motion to reopen."

Concerning this state of affairs, this Court:

> For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. [Citations omitted.] The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. (Citations omitted.)

(*Bell v. Hood*, 66 S.Ct. 773 (1946), at 776.)

This Court, in its reversal of the Ninth Circuit in this case, made plain that a speaking of insubstantiality must be accompanied by a showing, that saying it is so does not make it so. This Circuit's Panel, that did nothing more in its MEMORANDUM than say what the Commissioner simply said in his Brief, would now make plain that saying it is so does make it so.

> It is for the District Court now to determine whether the Secretary's findings, in the light of all material proffered and admissible, are supported by "substantial evidence" within the command of § 205(g). *(Richardson v. Perales,* 91 S.Ct. 1420 (1971), at 1432.)

The District Court, in its referencing of § 205(g), would only mention its first sentence, this found to be the "pertinent part." Its fifth, in which abides what is commanding, on the word of this Court, would be utterly ignored by that Court.

The Panel, in its referencing, would find the pertinent part the part so found by the District Court. "The Commissioner's findings" and "supported by substantial evidence," phrases not to be found in the District Court's ORDER, are not to be found in the Panel's MEMORANDUM.

> [A] decision denying § 205(g) jurisdiction in *Salfi* or *Eldridge* would effectively have closed the federal forum to the adjudication of colorable constitutional claims. Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by " 'clear and convincing' " evidence. [Citations omitted.]
>
> This is not one of those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds. Respondent seeks only an additional opportunity to establish that he satisfies the Social Security Act's eligibility standards for disability benefits. Therefore, § 205(g) does not afford subject-matter jurisdiction in this case. (*Califano v. Sanders,* 97 S.Ct. 980 (1977), at 986.)

The Commissioner who would speak of this case, in which the claimant had never demonstrated a "relevant disability," to both the District Court and the Panel would only to the latter speak of "constitutional claim." His appraisal in the citing for the former would speak of "administrative exhaustion" and "final decision"; the one in the one for the latter would speak of "final decision" and "constitutional violation." He would then apprise the latter that the circumstances of Sanders' case and those of Wenzel's case are "virtually identical."

The District Court that would speak of this case would not speak of "constitutional claim." Its precedent would be found in one sentence, the one that addresses repetitive filings of insubstantial claims. It would then, effectively, make the showing of an establishment of a listed impairment in a Hearing Decision analogous to the seeking of an opportunity to establish a disability in a judicial review.

The Panel that would not speak of this case would speak of "constitutional claim." Its precedent would be found in two cases, one in which the claimant "refused to appear at a scheduled hearing," and one in which it was shown that the claimant had never demonstrated a "mental incapacity." The Panel would then, unwilling to make precedent, unable to find it, simply impose it.

> We must determine, therefore, whether equitable tolling is consistent with Congress' intent in enacting § 405(g), and whether tolling is appropriate on these facts. The statute of limitations we construe in this case is contained in a statute that Congress designed to be "unusually protective" of claimants. *Heckler v. Day*, 467 U.S., at 106, 104 S.Ct., at 2251. Moreover, Congress has authorized the Secretary to toll the 60-day limit, thus expressing its clear intention to allow tolling in some cases. While in most cases the Secretary will make the determination whether it is

> proper to extend the period within which review must be sought, cases may arise where the equities in favor of tolling the limitations period are "so great that deference to the agency's judgment is inappropriate." *Eldridge,* 424 U.S., at 330, 96 S.Ct., at 900. As in *Honda v. Clark,* we conclude that application of a "traditional equitable tolling principle" to the 60-day requirement of § 405(g) is fully "consistent with the overall congressional purpose" and is "nowhere eschewed by Congress." 386 U.S., at 501, 87 S.Ct., at 1197. (*Bowen v. City of New York,* 106 S.Ct. 2022 (1986), at 2030.)

This Court, after its consideration of the facts of the SSA's "secretive conduct," then determined that equitable tolling was appropriate in this case. The District Court and the Panel, after their nonconsideration of the facts of the agency's overt conduct, then had no reason to determine whether equitable tolling was appropriate in Wenzel's case.

Thus has the Commissioner who refuses to do what the regulatory provision states that he will do been accommodated, both in this and in his refusal to do what the statutory provision at once authorizes and commands him to do. His conduct, not other than a set-piece scorning of the constitutional provision, asks for the attention of this Court.

The District Court and the Panel's accommodative decisions have effectively nullified this Court's relevant decisions.

The District Court and the Panel's unjudicial proceedings, wherein their selective disallowance of the relevant facts allows their here ignoring of and there misstating of the applicable law, call for an exercise of the supervisory power of this Court.

CONCLUSION

The findings of the Commissioner are not just unsupported by substantial evidence: they are categorically refuted by, beginning with the Hearing Decision's medical evidence, all of the evidence. This is the fact that the Commissioner has never even tried to deny, is one of the facts that the District Court and the Panel elected to disallow.

For the foregoing reasons, these constituting a manifest injustice to the petitioner, the petition for writ of certiorari and request for summary reversal should be granted.

Respectfully submitted,

ROBERT M. WENZEL
Petitioner pro se
1162 Spanish Armada Road
Las Vegas, NV 89123
(702) 361-1226

May 6, 1999

No.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MARSHALL WENZEL, Petitioner,

v.

Commissioner of Social Security
KENNETH STEVEN APFEL, Respondent

APPENDIX A

Plaintiff Exhibits 1, 2, 5, 6, 24, and 29 of Appendix A were submitted with Complaint of November 15, 1996 in:

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT M. WENZEL, Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security, Defendant.

No. CV-S-96-01063-HDM(LRL)

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DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

To: •
Mr. Robert M. Wenzel
P. O. Box 8089
Honolulu, Hawaii 96815

NOTICE OF DECISION PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below.

You, or your representative, may file the request for review at the nearest office of the Social Security Administration, or you may file the request for review with the hearing office or the Appeals Council.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under sections 205(g) and 1869(b) of the Social Security Act.

This notice and enclosed copy of
hearing decision mailed
May 21, 1974

CC:

Name and Address of Representative:

____

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING DECISION

In the case **of** Robert M. Wenzel (Claimant)	))))	**Claim for** Period of Disability and Disability Insurance Benefits
____________________ (Wage Earner) (Leave blank if same as above)	)))))	264-50-3342 (Social Security Number)

The Claim

This case arises out of an Application for Disability Insurance Benefits filed under sections 216(i) and 223 of the Social Security Act (Public Law 271, 74th Cong., 49 Stat. 620, as amended) on September 13, 1972 by Mr. Robert M. Wenzel, the Claimant, which is regarded as claiming that he has been unable to engage in any substantial gainful activity since April 11, 1972 by reason of a medically determinable circulatory impairment in his left leg resulting from a battle injury he sustained while serving in the Navy during the Vietnam War. The claimant has represented that he was born on March 11, 1937; that he left school after the 10th grade but had been determined to have a "one year college equivalency" in a test he had taken in the Navy; that he had enlisted in the Navy in 1954, when he was 17, taken a radarman's course, risen to radarman first class (the counterpart of a technical sergeant in the Army) and been assigned to the master of arms in charge of two river patrol boats, when he was wounded by an enemy rocket in 1968; that he was medically discharged from the Navy in August of 1971; that he had worked as a security guard at a ski resort from December of 1971 until the skiing season closed in April of 1972; that after that, he had unsuccessfully sought employment through the California State Employment Service; that he had then moved to Hawaii, where, after he had been hospitalized for five days in August of 1972 for evaluation of a complication resulting from one of his wounds, he had gone on the labor pool rolls of a temporary help enterprise until October of 1972, during which he put in a total of about 80 hours driving new cars from the piers to new car dealers' showrooms and doing various warehouseman's type jobs; that in late January of 1974, he began a nine weeks college entry brush-up course for veterans at a college under a federal program administered by the State's vocational rehabilitation agency which pays him $210 to $215 monthly allowance for living expenses; and that his intent was to go to college to study journalism.

The Applicable Law

The following provisions of the Social Security Act are of particular significance in this case:

The portion of section 223(a)(1) which provides that an individual "who (A) is insured for disability insurance benefits (as determined under subsection (c)(1)), (B) has not attained the age of sixty-five, (C) has filed application for disability insurance benefits, and (D) is under a disability (as defined in subsection (d))" shall be entitled to disability insurance benefits.

The portions of sections 216(i)(1) and 223(d)(1) which define "disability" to mean "inability to engage in any substantial gainful activity by reasons of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

The portion of section 223(d)(2) which reads: "an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the county."

The portion of section 223(d)(3) which defines a "physical or mental impairment" as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 223(d)(5) which reads: "An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

The portion of section 216(i)(2)(D) which provides that a period of disability "shall end with the close of the second month following the month in which the disability ceases" and the portion of section 223(a)(1) which provides that an individual who is under a disability shall be entitled to disability insurance benefits "ending with the month preceding the third month following the month in which his disability ceases."

The following provisions of Social Security Administration Regulations Number 4 (20 C.F.R. 404) are also of special importance:

The portion of section 1501(c) which reads: "Statements of the applicant, including his own description of his impairment (symptoms) are, alone, insufficient to establish the presence of a physical or mental impairment."

The portion of section 1523 which reads: "An individual who has filed an application for the establishment of a period of disability or for disability insurance benefits shall submit medical evidence showing the nature and extent of such individual's impairment or impairments during the time he alleges he was under a disability."

The portion of section 1524 which reads: "Medical evidence of an individual's mental or physical impairment shall include (a) A report signed by a duly licensed physician; (b) A (certified) copy of, or abstract from, the medical records, if any, of a hospital, clinic, institution, or sanatorium, or public or private agency, . . . or (c) Other medical evidence of probative value. Medical reports, copies of medical records or other medical evidence submitted to substantiate an allegation that an individual is under a disability shall include reports of clinical findings (such as the individual's medical history, physical or mental status examinations or both), laboratory findings, diagnosis, and treatment prescribed and response; . . . The clinical and laboratory findings shall be sufficiently comprehensive and detailed to permit the making of independent determinations by the Administration or by a State agency as to the nature and limiting effects of the individual's physical or mental impairment or impairments for the period in question, his ability to engage in physical and mental activities, and the probable duration of such impairment."

The Issues

The record of this case contains nothing which suggests that the Social Security Administration questions or should question the presence of the so-called "non-disability factors" – the insured status, age and application-filing requirements – for entitlement to the benefits sought by the Application from the date on which the Claimant allegedly became unable to work through the date of this Decision.

The record indicates that the important points that are to be regarded as being questioned in this case are: (1) Whether the so-called "disability factors" – the requirements of the medically determinable physical or mental impairment, the inability to engage in any substantial gainful activity, the causal connection between the impairment and the inability to engage in any substantial gainful activity, and either the reasonable expectation that the impairment will result in death or the actual or reasonably expected 12 months minimum continued duration of the inability to work by reason of the impairment – for entitlement to the benefits sought have been met; (2) If they have been met, when they were first met and whether they have continued to be met through the date of this Decision; and (3) If they have been met but have not continued to be met through the date of this Decision, when they ceased to be met.

The Hearing

Following initial and reconsidered denials of the claim, the Claimant filed a timely request for a hearing on it. The hearing officer conducted a hearing in Honolulu, Hawaii on March 18, 1974. The Claimant was present and testified. Various documents marked as "exhibits" for identification purposes were admitted into evidence. A list of the exhibits has been prepared and a copy of it will be sent to the Claimant along with a copy of this Decision.

The Rationale

The hearing officer respects and admires and is grateful to the Claimant for his service in our country's armed forces in time of war and the battle wounds he sustained in such service, but the hearing officer cannot allow this claim on the evidence at hand.

The evidence clearly showed that the Claimant had sustained multiple shell fragment wounds to the left side of his face, his left arm, his chest, and his left leg with artery, vein and nerve involvement in the Vietnam War in March of 1968. The documentary evidence established that the had been allowed a period of disability and monthly disability insurance benefits under the Social Security Act through May of 1969, after which they were terminated, on a prior Application for Disability Insurance Benefits.

The Claimant testified that the ski resort security job he had held from December of 1971 to April of 1972 required him to be on his feet most of the time, which aggravated the circulation in his left leg; that he was hospitalized for an evaluation of that condition at the Army's Tripler General Hospital in Hawaii, where he had been given a support stocking and told to keep his leg elevated as much as possible, in August of 1972.

The Claimant further testified that while he had been given a 60% disability rating on his discharge from the Navy in 1971 and had thereafter been awarded a 50% disability rating by the Veterans Administration, he had applied for a reevaluation of his rating by the Veterans Administration, had been examined at its Honolulu Clinic in November of 1972, had his disability rating increased to 70% and had been allowed an additional 30% for "deemed unemployability", making for a 100% disability, which began paying him $495 a month in veteran's disability benefits in April of 1973.

The Claimant also testified that in sitting through the five hours a day, five days a week schooling he was undergoing, he would prop his left leg up on another chair, extending it parallel to the floor, to keep down the flash cramps and pains in the leg and swelling in the foot which would come on any time his leg was below his torso – he was sitting, standing or walking – continuously for as long as 12 to 16 hours. He explained that propping his leg 45 ° above a horizontal plane by leaning back in a chair as he did in his apartment made for greater comfort but was not practical in a classroom. He claimed that the "disesthesia sensations" in the leg had increased recently and that the dermatitis on the ankle, which was caused by poor circulation resulting from loss of a part of an artery and other blood vessels, had doubled in size over the past two years and that bloody fluids would collect in the ankle area, discolor it and occasionally drain through an opening in the skin. But he acknowledged that aside from salves and powders for the dermatitis, he was taking no medications and that he was not seeing any doctors for the condition on a regular basis; that he could drive; and that he had made trips to California in October of 1972 and November of 1973 since coming to Hawaii.

The Claimant said that he had "no affinity for technical work" even though he had been a radarman in the Navy; that civilian jobs similar to that work were scarce; and that he had done sedentary work as a public relations clerk on a voluntary basis while he was awaiting his medical discharge from the Navy, but that he had had to put his leg up on his desk for relief from time to time. He stated that he did not think he could do a security guard's job any more because of his leg condition.

The only medical reports in evidence relating to the Claimant's condition since April of 1972 consisted of a Tripler Hospital narrative summary on his August 1972 five day stay there and the clinical record on his November 1972 Veterans Administration 1972 evaluation.

The Tripler record mentioned that the Claimant had been "admitted for impending venous ulcer of the left lower extremity". It listed the physical findings relating to his left leg: "Extremities; there are good pulses throughout; on the medial aspect, just above the malleolus of the left lower extremity, there is an area of hyper-pigmentation healing skin indicative of stasis dermatitis, approximately 5 x 5 cm in diameter. There is some superficial erosion. There is a trace of pedal edema of the left side. There are extensive superficial varicosities of both lower extremities." It explained, "Plan will be to continue to treat the area of stasis dermatitis locally and have the patient fitted with a Jobst stocking for a therapeutic trial." It noted that he was "to be followed in Vascular Clinic". A November 1972 request by the so-called State Agency which assists the Social Security Administration in evaluating its Hawaii disability cases to Tripler for outpatient treatment records for the Claimant was responded to by a note which read: "Transit patient. Was not followed on OP basis."

The Veterans Administration clinical record mentioned that the Claimant had the following deficiencies in his left lower extremity: flexion limitation in his knee, tenderness on pressure on the knee cap, some motion limitation in the ankle, an area of stasis dermatitis on the ankle measuring 5" by 2", diminished pedal pulsation, some quadriceps weakness, no elicitation of ankle reflex, hypesthesia to pin prick from the thigh to foot, a normal gait but some difficulty toe to heel walking and inability to squat fully.

Although the evidence indicates that the Claimant does experience some discomfort in his left leg on being active, it also indicates that he is much too able bodied and minded not to be up and about like a normal person. He is 6'2" in height and weighs the 190 to 200 pounds that he weighed before he was wounded. His letters in evidence were very well written and his testimony was very well spoken and his letters and testimony indicated he is very intelligent and knowledgeable. He has easily had the residual functional capacity to satisfactorily engage in a wide variety of at least light and sedentary work.

The hearing officer can fault no man who has served in our country's armed forces and been wounded in battle for fully exploring the benefits available to him because of his injuries. The Claimant remains, however, too well equipped a man to be held qualified for Social Security disability insurance benefits, that is to say, unable for a period of not less than 12 months to engage in any substantial gainful activity by reason of the remaining effects of his wounds, at any time since April of 1972.

The Claimant appears well-advised in his plans to enter college to take journalism. He seems certain for success, particularly in that field. But if he can go to college, he can do a desk job. Even though that would be a waste, it is a measure which indicates his non-disability for Social Security purposes.

The Findings and Conclusions

The hearing officer, accordingly, makes the following findings of fact and conclusions of law:

1. The Claimant met the so-called non-disability factors – the insured status, age and application filing requirements – for entitlement to a period of disability and monthly disability payments under sections 216(i) and 223 of the Social Security Act on April 11, 1972, the date when the Claimant allegedly became unable to engage in any substantial gainful activity and which is hereinafter referred to as "the alleged disability onset date", and has continued to meet them through the date of this Decision.

2. The so-called disability factors for entitlement to such disability insurance benefits which the Claimant appears to have had the best possibility of meeting involve an inability to engage in any substantial gainful activity by reason of medically determinable impairments for a continuous period of not less than 12 months or being now so incapacitated with such incapacitation reasonably expected to continue for such a period.

3. The Claimant's age, education and work experience, at least for the purposes of this case, are as represented by the Claimant and summarized on the first page of this Decision.

4. Since the alleged disability onset date, the Claimant has had the following significant medically determinable impairments: shrapnel fragments and artery and nerve involvement in his

left leg and dermatitis with an occasional draining skin lesion on his left ankle as residuals of battle wounds sustained while serving in the Navy in the Vietnam War.

5. By reason of those impairments, the Claimant has not been unable to engage satisfactorily in any substantial gainful activity for what has been a continuous period of not less than 12 months at any time since the alleged disability onset date, nor is the Claimant now so incapacitated with such incapacitation reasonably expected to continue for what will eventually be such a period.

6. The Claimant, consequently, has not been at any time since the alleged disability onset date, and is not now, under a disability, as that term is defined in sections 216(i) and 223 of the Social Security Act for purposes of obtaining a period of disability and monthly disability insurance benefits payments under the Act.

-o-

It is, therefore, the decision of the hearing officer that, on the basis of the application for Disability Insurance Benefits filed by or on behalf of the Claimant on September 13, 1972, the Claimant is not entitled to a period of disability or to monthly disability insurance benefits payments under the Social Security Act.

Dated: May 21, 1974 /s/ William H. Yim
William H. Yim
Administrative Law Judge

(Seal) DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, WASHINGTON, D.C. 20013

REFER TO: IHA-2 BUREAU OF
264-50-3342 HEARINGS AND APPEALS

2 OCT 1974

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Robert M. Wenzel
Box 8089
Honolulu, Hawaii 96815

Dear Mr. Wenzel:

Your request for review of the administrative law judge's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the evaluation of the facts and the reasoning in this decision, and your reasons for believing your claim should be allowed.

The Appeals Council has concluded that this decision is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the administrative law judge's decision stands as the final decision of the Secretary in your case.

If you desire a review of the decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended (section 405(g), Title

42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

/s/ Carl Monk
Carl Monk
Member, Appeals Council

Social Security Administration
Retirement, Survivors and Disability Insurance
Notice of Disapproved Claim

Office of Disability Operations
1500 Woodlawn Drive
Baltimore, Maryland 21241

Date: AUG. 14, 1988
Claim Number: 264-50-3342 HA

ROBERT M WENZEL
3989 CEDAREDGE CT
LAS VEGAS NV 89120

We have determined that you are not entitled to disability benefits. The reason you are not entitled is that you do not meet the earnings requirement of the law at the time you state you became disabled or at any later date.

It is important for you to know that we have not made any determinations as to whether or not you are disabled within the meaning of the law. Since you do not meet the earnings requirement, it has not been necessary to decide whether you meet the disability requirement.

In addition you are not entitled to any other benefit based on the application you filed.

If you believe this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any Social Security office. If additional evidence is available, you should submit it with your request.

If you have any questions, you should call, write or visit any Social Security office. If you visit an office, please bring this letter. It will help us answer your questions.

/s/ Joseph R. Muffolett
Joseph R. Muffolett
Director
Office of Disability Operations

Enclosure:
SSA-10058
SSA-10072

SOCIAL SECURITY ADMINISTRATION

Office of Disability and
International Operations
1500 Woodlawn Drive
Baltimore, Maryland 21241

JUL 13 1992

Refer to: S2HA222
264-50-3342

Mr. Robert Wenzel
1162 Spanish Armada Road
Las Vegas, Nevada 89123

Dear Mr. Wenzel:

This is in response to your letter concerning Social Security benefits that you have not received.

Our records show that you were allowed a closed period of disability for the period of October 1968 through May 1969 and terminated June 1969.

Our records further show that you last met insured status March 31, 1977. There is nothing to show that the information in our letter to you dated August 14, 1988 has changed the decision in that letter.

We apologize for the delay in responding to your letter.

Sincerely,

/s/ Joseph R. Muffolett
Joseph R. Muffolett
Director

(Logo) **SOCIAL SECURITY ADMINISTRATION**

Refer to: TAHBK
264-50-3342

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

MAR -6 1996

ORDER OF APPEALS COUNCIL DENYING REQUEST FOR EXTENSION OF TIME TO FILE CIVIL ACTION AND REQUEST FOR REOPENING

Mr. Robert M. Wenzel
1162 Spanish Armada Road
Las Vegas, NV 89123

Dear Mr. Wenzel:

On October 2, 1974, the Appeals Council denied a request for review of an Administrative Law Judge's decision on this case. The Council has now received a request for reopening of the decision and, if reopening is declined, a request for an extension of time in which to commence a civil action.

In accordance with Social Security Administration Regulations, a decision may be reopened within specified time limits on the basis of new and material evidence or if the evidence considered in making the decision clearly shows on its face that an error was made (20 CFR 404.987-989).

The specified time limits for reopening a decision are four years from the date of the initial determination. In this case, the initial determination was made over 20 years ago. Clearly, there is no regulatory basis to reopen and revise the initial determination denying your application for a period of disability and disability insurance benefits.

In accordance with Social Security Administration regulations, the Appeals Council may, where good cause is shown, extend the time in which to commence a civil action (20 CFR 404.982-911).

From its review of this case, the Council notes that you received the denial notice timely and you were aware of the 60-day time limit for filing a civil action. Your contention that you did file a civil action because you believed the Administrative Law Judge's decision was correct and you now are of the opinion the decision was incorrect does not constitute good cause to extend the filing limit for filing a civil action, in accordance with the above-cited regulations. Moreover, contrary to your assertion, the Administrative Law Judge's consideration of your ability to attend college is required by section 404.1529 which requires the consideration of daily activities in assessing the credibility of an individual's subjective complaints.

After carefully considering the circumstances in this case, the Appeals Council is not persuaded that good cause for an extension of the time in which to commence a civil action has been shown. The request is, therefore, denied.

Sincerely yours,

/s/ Peter A. Greenlee
Peter A. Greenlee
Administrative Appeals Judge

(Logo) **SOCIAL SECURITY ADMINISTRATION**

Refer to: TAHBK
264-50-3342

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

APR 15 1996

Mr. Robert M. Wenzel
1162 Spanish Armada Road
Las Vegas, NV 89123

Dear Mr. Wenzel:

On March 6, 1996, the Appeals Council denied a request for an extension of time to file a civil action and a request for reopening. The Council has now received your letter dated March 18, 1996.

The Appeals Council considered the contentions raised in your letter but concluded that these contentions do not provide a basis for vacating its previous action in this case.

The Council has decided there is no basis to grant the request for an extension of time to file a civil action nor is there any basis for reopening the hearing decision dated May 21, 1974. Accordingly, that decision stands as the final decision of the Commissioner on the application dated September 13, 1972.

Sincerely yours,

/s/ Peter A. Greenlee
Peter A. Greenlee
Administrative Appeals Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT M. WENZEL, Plaintiff,	CV-S-96-01063-HDM (LRL)
vs.	ORDER
SHIRLEY S. CHATER, Commissioner of Social Security Defendant.	(Filed Feb. 10, 1996)

Plaintiff filed a motion for entry of default against the defendant (#3) for failure to timely answer the complaint. While there is evidence in the record that plaintiff served the United States attorney for the District of Nevada by registered mail, the service was improper pursuant to F.R.C.P. 4(i)(1)(A). Authorized mail service must be specifically addressed to the civil process clerk of the office of the United States attorney. Accordingly, plaintiff's motion is *denied*. Plaintiff is granted leave to effect proper service.

It is so ORDERED.

Dated this 10th day of February, 1996.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT M. WENZEL,
SSN 264-50-3342,

Plaintiff,

vs.

JOHN J. CALLAHAN,
Commissioner
of Social Security,

Defendants.

CV-S-96-
1063-HDM(LRL)

ORDER

(Filed Apr. 21, 1997)

The motion of the United States to remand (#6) is granted pursuant to 42 U.S.C. § 205(9).

It is so ORDERED.

Dated this 17th day of April, 1997.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT WENZEL, SSN: 264-50-3342, Plaintiff, vs. JOHN J. CALLAHAN, Acting Commissioner of Social Security Administration, Defendant.	CV-S-96-1063-HDM(LRL) ORDER (Filed Nov. 4, 1997)

The court's order of April 24, 1997 remanding this action (#9) is vacated upon petition of the defendant. The defendant has filed a motion to dismiss (#11). The plaintiff shall have until November 20, 1997 to file a response to the motion.

It is so ORDERED.

Dated this 29th day of October, 1997.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

United States District Court

– DISTRICT OF NEVADA

ROBERT M. WENZEL, **Plaintiff,**	JUDGMENT IN A CIVIL CASE
V.	(Filed Feb. 24, 1998)
SHIRLEY S. CHATER, **Defendant.**	CASE NUMBER: CV-S-96-1063-HDM(LRL)

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to /be considered by the Court. The issues have been /considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss is granted; SO THEREFORE, judgment is entered in favor of defendant and against the plaintiff.

February 24, 1998 *Date*	LANCE S. WILSON *Clerk*
	/s/ Illegible *(By) Deputy Clerk*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT M. WENZEL,
Plaintiff,
vs.
KENNETH S. APFEL,
Commissioner of Social Security,
Defendant.

CV-S-96-01063-HDM (LRL)

ORDER

(Filed Feb. 12, 1998)

This is an action pursuant to 42 U.S.C. sec. 405 (g) and 42 U.S.C. sec. 1383 (c) for judicial review of the denial of the plaintiff's claim for benefits under Title II of the Social Security Act. This matter is before the court on defendant's motion to dismiss for failure to exhaust administrative remedies (#10).

Administrative Proceedings

In October of 1968, the plaintiff, Robert M. Wenzel, filed an application for disability insurance benefits. The Social Security Administration found that he was under a disability for the period October 1968 through May 1969. Wenzel subsequently filed another application for disability insurance benefits on September 13, 1972, which was denied. The plaintiff filed a Request for Reconsideration and, upon reconsideration, the claim was denied. After timely filing a Request for Hearing, an evidentiary hearing was held before Administrative Law Judge William H. Yim. Judge Yim issued a decision on May 21, 1974, finding that the plaintiff was not under a disability. On October 2, 1974, the Appeals Council denied a Request for Review, which constitutes the administration's final decision.

Wenzel filed a third application for disability insurance benefits in August 1988, alleging onset of disability commencing in March 1980. On August 14, 1988, the administration notified Wenzel that his application was denied because he did not meet the earnings requirement under the Social Security Act. The notice advised Wenzel of his right to request reconsideration of the determination within 60 days of receipt of the notice. Wenzel failed to file a Request for Reconsideration. On June 27, 1988, the administration notified Wenzel that he was ineligible for supplemental security income benefits.

Wenzel wrote to the Social Security Administration regarding the status of his social security benefits. The administration responded and advised Wenzel that he last met the insured status requirements of the Act on March 31, 1977, and that there was no basis for changing the previous determinations denying plaintiff's claim for disability insurance benefits.

Wenzel again wrote to the administration concerning his eligibility to receive disability insurance benefits. The administration again advised the plaintiff that there was no basis for reopening the prior determinations made in his case, and that his right to file a court action had passed. On January 4, 1993, Wenzel inquired about his claim and the conditions under which a decision may be re-opened. On April 1, 1993, the administration wrote to Wenzel and provided a narrative history of his case, an explanation of the calculation of his last date insured, and the three regulatory bases for re-opening a prior determination.

On September 30, 1995, Wenzel petitioned to re-open the administration's previous decisions or, in the alternative, an extension of time in which to file a civil action. On March 6, 1996, the Appeals Council issued an order denying the plaintiff's requests. Unsatisfied, the plaintiff again requested a re-opening and an extension of time. On April 15, 1996, the Appeals Council affirmed its decision to deny the requests. On November 15, 1996, the plaintiff commenced this action.

Discussion

Judicial review of actions arising under Title II of the Social Security Act is expressly limited to the provisions of 205(g) of the Act. *42 U.S.C. sec. 405(g) and (h).* Section 205(g) reads, in pertinent part,:

> Any individual, after any *final decision* of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced *within sixty days* after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

The Social Security Administration sets forth the administrative procedures under the Act by which a claimant may obtain a "final decision" of the Commissioner. Following an initial determination on a claim, a dissatisfied claimant may file a Request for Reconsideration. *20 C.F.R. secs. 404.907-909.* After reconsideration, the claimant may then request a hearing before an Administrative Law Judge. *20 C.F.R. secs. 404.929-33.*

The Administrative law Judge may grant or dismiss a request for a hearing. *20 C.F.R. 404.957.* A dismissal is final and binding, unless vacated by the Appeals Council of the Social Security Administration, either on its own motion or upon request by the claimant, within 60 days after the order of dismissal is issued. 20 C.F.R. sec. 404.959. If a hearing is granted, the claimant may request that the Appeals Council review the decision of the Administrative Law Judge. The request for review must be made in writing within 60 days from the date of receipt of notice of the decision. *20 C.F.R. sec. 404.968(a).* Upon written request, the Appeals Council may extend this time for good cause. *20 C.F.R. sec. 404.968(b).*

Thus, there are two applicable situations which would constitute a final and binding decision by the administration in this case: (1) if the Appeals Council declines review of a decision made after a hearing; or (2) if the Appeals Council grants a request for review and renders a decision thereon. *20 C.F.R. sec. 404.955.* Only after a request is made to the Appeals Council to review the decision of the Administrative Law Judge and such request has been acted upon, can there be a "final decision" of the Commissioner subject to judicial review within the meaning of section 205(g) of the Act. *20 C.F.R. sec. 404.981.*

Here, the plaintiff submitted three applications for disability insurance benefits. The plaintiff does not take issue with the administration's decision on his first application. On the second application, Judge Yim found that the plaintiff was not under a disability. On October 2, 1974, the Appeals Council denied a Request for Review, which then became the administration's final decision. The plaintiff had 60 days from the date he received notice of the decision to seek judicial review. Because the plaintiff failed to file a complaint within the specified time period, he is barred from seeking judicial review of that decision.

On Wenzel's third and final application, the administration made the initial determination that he did not meet the earnings requirement under the Social Security Act. Although the plaintiff was advised of the right to file a Request for Reconsideration at the time the administration denied his application, he failed to do so. Thus, there is no "final decision" of the Commissioner. Because the plaintiff failed to exhaust his administrative remedies, this court is without jurisdiction to review the administration's decision. *Hoye v. Sullivan*, 985 F.2d 990, 991 (9th Cir. 1992).

The plaintiff also seeks judicial review of his petition to re-open his case or, in the alternative, an extension of time within which to file a court action. In an order, dated March 6, 1996, the Appeals Council denied both of plaintiff's requests. The plaintiff cannot seek judicial review of this decision. In *Califano v. Sanders*, the Supreme Court held "an interpretation that would allow a claimant judicial review simply by filing – and being denied – a petition to re-open his claim would frustrate the congressional purpose, plainly evidenced in section 205(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision denying the initial claim for benefits." *430 U.S. 899, 108.*

Accordingly, the defendant's motion to dismiss is granted.

It is so ORDERED.

Dated this 6th day of February, 1998.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

DATE FILED: 11/15/96 N/S: 863 DISTRICT: 0978 ILLEGIBLE

DATE ILLEGIBLE: / / J: 2 ORD: 1
PD: 7 DD: 7 R23: 4 DMND: ILLEGIBLE

I. CAUSE

42 405 (G) – AN ABUSE OF DISCRETION BY THE DEFENDANT
NOT EXEMPT FROM FRCP 16(b)
FILING FEES PAID – RECEIPT 14496

II. UPPER ATTORNEY

WENZEL, ROBERT M. Plaintiff

ROBERT M WENZEL – PRO SE
1162 Spanish Armada Road
Las Vegas, NV 89123
(702) 896-2431

III. LOWER ATTORNEY

CHATER, SHIRLEY S Defendant

KATHRYN E. LANDRETH
CARLOS A. GONZALEZ
United States Attorney
District of Nevada
Assistant United States A
702 East Bridger, 8th Floor
Las Vegas, NV 89101
(702) 388-6336

DATE	NR	PROCEEDINGS
11-15-96	1	**COMPLAINT.** fj
"	–	**SUMMONS** issd P(1). (AT) fj
"	–	Filing fees paid. fj
"	–	JS-5 (AT) fj
1/15/97	2	**STATEMENT** of the entry of default as to obo P. jr
1/24/97	3	**STIPULATION/ORDER(LRL) ORD** that D has to 3/24/97 to fl an answr or resp pldng. (AT) Cps dist. jr
2/10/97	4	**ORDER (HDM) ORD** that Ps mtn (#2) is denied. P is granted lv to effect propr srvc. (AT) Cps dist. jr
2/24/97	5	**SERVICE** obo P- re U.S. Atty-LV,NV serv serv 2/19/97. efm
3/6/97	6	**MOTION** for remand obo D. (m) (AT) jr (**DISPO:** resp #7 granted Illegible
3/14/97	7	**RESPONSE** to Mtn for remand obo P. (nss) (AT) jr
3/25/97	8	**AFFIDAVIT** of service re #7 obo P. jr
Illegible		
4/21/97	9	**ORDER (HDM) ORD** that the mtn of US to remand (#6) is granted purs to U.S.C. § 205 (9). (AT) Cps dist. jr (EOD 4/24/97)
4/24/97	–	**JS-6. (AT) jr**
09/17/97	10	MOTION to dism obo D. (m) (AT) 1g resp #16B
–	11	MOTION to vacat Ord #9 & reopn civil actn obo D. (m) (AT) 1g

10/23/97	–	sub to mdm #1C illegible
11/4/97	12	**ORDER(HDM) ORD** that the crts ord of 4/24/97 remanding this actn (#9) is vacated upon petn of the D. The D has fld a mtn to dism (#11). The P shall have to 11/20/97 to fl a resp to the mtn. (AT) Cps dist. jr
~~11/14/97~~	~~13~~	~~**MOTION** to render a decsn obo P. (nss) (AT) jr **(DISPO**~~: Stricken per #15
–	~~14~~	~~**RESPONSE** to Ds mtn to dism (#10) obo P. (nss) (AT) jr~~ Stricken per #15
?/8/97	15	**ORDER STRIKING FILE DDOCUMENT** [sic] #13 & #14(LRL) ORD that the clk shall strike the ref doc's #13 & #14 frm the rec, notify cnsl of same & retain doc's in the official file. (AT) Cps dist. jr
?/14/97	16	**AFFIDAVIT/SERVICE** re Ps respnse of 11/14/97 & mtn of 11/14/ mid w/green receipts obo P. efm
?/2/97	17	**RECEIPT** (yellow) serv on A.G., Wash. DOC 11/19/97 (no explanation as to what was served. efm
?/1/97	18	**ORDER(LRL) ORD** that this crt's ord (#15) striking Ps flngs #13 & #14 because they were not accompanied by proof of service is hereby rescinded. Ps mtn (#14) & resp #14 shall be deemed fld as of 11/24/97. (AT) Cps dsit. jr

OF DATE ORDER***

?/24/97	16A	**MOTION** to render a decsn obo P. (m) (AT) jr **(DISPO:**
–	16B	**RESPONSE** to Ds mtn to dism (#10) obo P. (m) (AT) jr

?/8-97	19	**RECEIPT** (yellow) serv on Appeals Council, Falls Church, VA 11-17-97 (no explanation as to what was served. fj
?/0-97	–	JS-5 (AT) fj
?/0/97	–	Illegible
?/2/98	20	**ORDER(HDM) ORD** that Ds mtn to dism (#10) is granted. (AT) Cps dist. jr (EOD 2/24/98)
?/4/98	21	**JUDGMENT(LSW/jr) ORDER AND ADJUDGED THAT** os mtn to dism is granted and judgmnt is entered in favor of D. (AT) Cps dist. jr (EOD 2/24/98)
	–	JS___6. (AT) jr
?/2/98	22	**NOTICE/APPEAL** re #20 obo P. (AT) jr
–	–	**FEES PAID – RECEIPT #23898.** jr
?/?/98	23	**LETTER(COPY)** to Clk of C/A frm D/C Clk re notc/appeal. Orig to C/A w/cpy dkt sht, & cpy dkt sht, to cnsl. (AT) jr
–	24	**DOCKET FEE PAYMENT NOTIFICATION FOR(COPY)** C/A & D/C/ fees pd. Orig to C/A. jr
–	25	**CERTIFICATE OF RECORD (COPY)** Rec complete for appeal. Orig to C/A. Cps dist. jr
–	26	**LETTER(COPY)** to Clk C/A frm Clk D/C re cert/rec & rec reten. Orig to C/A cpys to cv cnsl w/cpy dkt sht, desig form. (AT) jr
–	–	**DOCKET SHEET(CC)** Clks rec retained by D/C. jr

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. WENZEL, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 98-15857 D.C. No. CV-96-01063-HDM MEMORANDUM* (Filed Oct. 26, 1998)

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted October 20, 1998**

Before: T.G. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

Robert M. Wenzel appeals pro se the district court's dismissal for lack of subject-matter jurisdiction of his appeal from the Commissioner's denial of Wenzel's September 1972 application for disability benefits and his motion to reopen his disability application for that year.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *see Evans v. Chater*, 110 F.3d 1480, 1481 (9th Cir. 1997), and we affirm.

Because Wenzel's attempt to seek judicial review of the Commissioner's denial of his September 1972 application for disability benefits was untimely, the district court properly concluded that it lacked subject-matter jurisdiction over this claim. *See* 42 U.S.C. § 405(g).

Because the Commissioner's denial of Wenzel's motion to reopen his 1972 application for benefits was not a final reviewable order under § 405(g), the district court also correctly dismissed this claim. *See Evans*, 110 F.3d at 1482. Moreover, Wenzel failed to raise a colorable constitutional claim to enable the district court to review the denial of his motion to reopen. *See Hoye v. Sullivan*, 985 F.2d 990, 991-92 (9th Cir. 1993) (per curiam); *cf. Evans*, 110 F.3d at 1482-84 (concluding that appellant's due process claim, which asserted that he had been denied a meaningful opportunity to be heard, conferred jurisdiction upon the district court to address this claim).

AFFIRMED.[1]

---

[1] To the extent that Wenzel contends that the district court erred by dismissing his appeal from the Commissioner's denial of his August 1988 application for disability benefits, we reject this contention because Wenzel failed to exhaust his administrative remedies with respect to this claim. *See Hoye*, 985 F.2d at 991.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. WENZEL, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner, Defendant-Appellee.	)	No. 98-15857 DC# CV-96-01063-HDM District of Nevada (Las Vegas) ORDER (Filed Feb. 8, 1999)

Before: T.G. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. No further filings will be accepted in this closed appeal.

The Constitution of the United States
Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 United States Code
Section 405(g)

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

No.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MARSHALL WENZEL, Petitioner,

v.

Commissioner of Social Security
KENNETH STEVEN APFEL, Respondent

APPENDIX B

Defendant Exhibit 5 of Appendix B was submitted with Motion to dismiss of September 17, 1997 in:

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT M. WENZEL, Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security, Defendant.

No. CV-S-96-01063-HDM(LRL)

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KATHRYN E. LANDRETH
United States Attorney
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Attorneys for Federal Defendant
Shirley S. Chater

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-o0o-

ROBERT M. WENZEL, SSN 264-50-3342 Plaintiff, v. SHIRLEY S. CHATER, Commissioner of Social Security, Defendant.	CV-S-96-01063-HDM-(LRL) STIPULATION FOR EXTENSION OF TIME TO ANSWER (First Request) (Filed Jan. 24, 1997)

IT IS HEREBY STIPULATED, by and between the parties, Robert M. Wenzel, in proper person, and Carlos A. Gonzalez, Assistant United States Attorney, counsel for Defendant Shirley S. Chater, Commissioner of Social Security, that the Defendant, Shirley S. Chater, Commissioner of Social Security, shall have an additional sixty days (60), to and including March 24, 1997, to file an Answer or responsive pleading herein.

This extension of time is sought due to a delay in the preparation of the Administrative Records and suggested Answer to the Complaint from the Social Security Administration, Answer Staff, Falls Church, Virginia. At the present time, Defendant's deadline to answer or otherwise plead to Plaintiff's Complaint is Tuesday, January 21, 1997.

This is the first request for an extension of time to file an answer or responsive pleading herein.

DATED this 16th day of January, 1997.

KATHRYN E. LANDRETH
United States Attorney

/s/ Robert M. Wenzel
ROBERT M. WENZEL
In Pro Per

/s/ Carlos A. Gonzalez
CARLOS A. GONZALEZ
Assistant U.S. Attorney
Counsel for Defendant

IT IS SO ORDERED.

/s/ Illegible
UNITED STATES
MAGISTRATE JUDGE

DATED: 1/24/97

KATHRYN E. LANDRETH
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-o0o-

ROBERT M. WENZEL, SSN: 264-50-3342 Plaintiff, v. JOHN J. CALLAHAN,[1] Commissioner of Social Security, Defendant.	)	CV-S-96-01063-HDM-(LRL) MOTION FOR REMAND

COMES NOW the United States of America, by and through its attorneys, Kathryn E. Landreth, United States

---

[1] President Clinton appointed John J. Callahan to serve as Acting Commission [sic] of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, John J. Callahan should be substituted, therefore, for Shirley S. Chater, as the defendant in this suit. No further action need to be taken to continue this suit by reason of the last sentence of § 205(g) of the Social Security Act. 42 U.S.C. § 405(g).

Attorney for the District of Nevada, and Carlos A. Gonzales, Assistant United States Attorney, and representing John J. Callahan, Commissioner of Social Security, moves this Honorable Court for an order for remand.

This Motion is based on the letter received by this office from the Office of the General Counsel, Social Security, on Thursday, March 6, 1997, attached hereto and incorporated herein as Exhibit 1.

DATED this 6th day of March, 1997.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

/s/ Carlos A. Gonzalez
CARLOS A. GONZALEZ
Assistant United States Attorney

[SEAL]
SOCIAL SECURITY
Office of the General Counsel

March 6, 1997

Answer Staff
5107 Leesburg Pike
Room 1704 Skyline Tower
Falls Church, VA 22041-3255
(703) 305-0551
(703) 305-1271 (FAX)

Honorable Kathryn E. Landreth
United States Attorney
Post Office Box 16030
Las Vegas, Nevada 89101

Re: Robert Wenzel v. Callahan[1]
(NV, Civil CV-S-96-01063-HDM(LRL))
(SSN: 264-50-3342)
(GC:SS:K. Vazquez)

Dear Ms. Landreth:

The Appeals Council wishes to take further administrative action in this case. Therefore, we request that you file a motion to remand this case to the defendant for further administrative action pursuant to sentence 6 of section

---

[1] President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, John J. Callahan should be substituted, therefore, for Shirley S. Chater, as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

205(g) of the Social Security Act, 42 U.S.C. 405(g) which provides that:

> " * * * The court may, on motion of the commissioner made for good cause shown before he files his answer, remand the case to the Commissioner for further action by the Commissioner * * * "

See Melkonyan v. Sullivan, 501 U.S. 89, 101 n.2 (1991); *Shalala v. Schafer*, 113 S.Ct. 2625, 2629 n.2 (1993).

The joint conference committee of Congress in reporting upon the Social Security Disability Amendments of 1980 (to the Social Security Act) stated that in some cases procedural difficulties, such as an inaudible hearing tape or a lost file, necessitate a request for remand by the Commissioner. The intent of the committee was that such procedural defects be considered "good cause" for remand. The committee states:

> " * * * Such a situation is an example of what could be considered 'good cause' for remand. Where, for example, the tape recording of the claimant's oral hearing is lost or inaudible, or cannot otherwise be transcribed, or where the claimant's files cannot be located or are incomplete, good cause would exist to remand the claim to the Commissioner for appropriate action to produce a record * * * " (H.R. Rep. No. 96-944, 96th Cong., 2d Sess. 59 (1980)).

We have now been informed by the Office of Hearings and Appeals that the Appeals Council seeks voluntary remand to locate the missing claim file. If unable to locate within a reasonable amount of time, procedures to reconstruct the missing file will be initiated. Therefore, good cause exists to support this request for remand.

The Answer Section of the Office of General Counsel, located in Falls Church, Virginia is responsible for following up to be sure that a remand order is entered by the Court or that comments are provided to your office if a plaintiff files objections to the motion to dismiss. *Therefore, please be sure to promptly forward a copy of any order or pleading filed with regard to this motion to remand (preferably by fax) to the Answer Section in Falls Church, Virginia.*

Sincerely yours,

By /s/ Peter S. Krynski /kev
Peter S. Krynski
Supervisory Attorney

cc: Region IX
GS:SS:K. Vazquez

KATHRYN E. LANDRETH
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Attorneys for Defendant
Social Security Administration

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-oOo-

ROBERT WENZEL,
SSN: 264-50-3342

Plaintiff,

v.

JOHN J. CALLAHAN, Acting
Commissioner of Social
Security Administration,

Defendant.

CV-S-96-01063-
DWH-(LRL)

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, Defendant, John J. Callahan, Acting Commissioner of Social Security Administration, by and through his attorneys, Kathryn E. Landreth, United States Attorney for the District of Nevada, and Carlos A. Gonzalez, Assistant United States Attorney, and files Defendant's Motion to Dismiss Plaintiff's Complaint.

This Motion is based on the Points and Authorities attached hereto and incorporated herein.

DATED this 17th day of September, 1997.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

/s/ Carlos A. Gonzalez
CARLOS A. GONZALEZ
Assistant U.S. Attorney

* * *

POINTS AND AUTHORITIES

Statement of Facts

This is an action brought by Plaintiff for judicial review of the denial of his claim for benefits under Title II of the Social Security Act (hereinafter referred to as the Act). The Plaintiff has failed to exhaust his administrative remedies with respect to his claim for benefits and, therefore, there has been no "final decision" of the Commissioner as contemplated by Section 205(g) of the Act, 42 U.S.C. § 405(g). Thus, this Court is without jurisdiction over the subject matter of the action.

The declaration of the office of Hearings and Appeals, Social Security Administration, attached hereto, sets forth the procedural history in this matter.

The Social Security Administration Instructions Manual System sets forth the current policy regarding the storage and destruction of inactive claim folders. The current instructions regarding the storage and destruction of inactive disability claim files are contained in § DIB-01.01.00 (Exhibit 1 of Declaration).

Requests for Records Disposition Authority, approved on February 3, 1988, revised the retention period to five years after the event date the inactive claim was denied (disallowed) or terminated. Any inactive claim file which, having already served the requisite five-year retention period, has been destroyed (Exhibit 2 of Declaration.

The Plaintiff filed an application for disability insurance benefits in October 1968, and was found under a disability for the period October 1968 through May 1969 (Exhibit 10 of Declaration).

Plaintiff filed an application for disability insurance benefits on September 13, 1972. This claim was denied initially and upon reconsideration. On May 21, 1974, an Administrative Law Judge issued a decision finding that the Plaintiff is not under a disability (Exhibit 3 of Declaration (pages 7ff are unavailable)). On October 2, 1974, the Appeals Council denied Plaintiff's request for review of that decision. Although advised of the right to commence a civil action within 60 days of receipt of the notice, such action was not commenced (Exhibit 4 of Declaration).

On August 2, 1988, Plaintiff filed his third application for disability insurance benefits, alleging onset of disability commencing March 12, 1980 (Exhibit 5 of Declaration). This application was denied by notice dated August 14, 1988. Although advised of the right to request reconsideration of the determination within 60 days of receipt of the notice, such request was not made. Plaintiff was also advised by notice dated June 27, 1988, that he is ineligible for supplemental security income benefits (Exhibit 6 of Declaration).

Plaintiff sent the Social Security Administration a letter concerning Social Security benefits. By letter dated July 13, 1992, Plaintiff was advised that he last met the insured status requirements of the Act on March 31, 1977, and there is no basis for changing the determination dated August 14, 1988, denying Plaintiff's claim for disability insurance benefits (Exhibit 7 of Declaration). On August 27, 1992, after a complete investigation of Plaintiff's earnings record, it was affirmed that insured status was last met on March 31, 1977. Plaintiff's prior period of disability, and his earnings for 1978, 1979, and 1980 did not extend the date last insured (Exhibit 8 of Declaration).

Plaintiff submitted a letter concerning his eligibility to receive disability insurance benefits. In a letter dated September 4, 1992, Plaintiff was again advised that there is no basis for reopening the prior determinations made in his case (Exhibit 9 of Declaration). On January 4, 1993, Plaintiff inquired about his claim. By letter dated April 1, 1993, Plaintiff was provided a narrative history of his case, an explanation of the calculation of his date last insured, and three regulatory bases for reopening prior determinations (Exhibit 10 of Declaration). Plaintiff requested reopening of the Administrative Law Judge's decision and an extension of time in which to file a civil action. On March 6, 1996, the Appeals Council issued an order denying Plaintiff's request for an extension of time in which to commence a civil action, as well as Plaintiff's request for reopening (Exhibit 11 of Declaration). In Plaintiff's letter dated March 18, 1996, he again requested reopening and an extension of time. By letter dated April 15, 1996, the Appeals Council affirmed its decision to deny Plaintiff's requests (Exhibit 12 of Declaration).

On November 15, 1996, Plaintiff commenced a civil action in the United States District Court for the District of Nevada.

Judicial review of cases arising under Title II of the Social Security Act is provided in, and expressly limited by, § 205(g) and (h) of the Act, 42 U.S.C. § 405(g) and (h). The remedy provided therein is exclusive. It is well settled that the United States is immune from suit except as it specifically consents to be sued and that the terms of such consent define the jurisdiction of any court in which such suit properly can be brought. *United States v. Sherwood*, 312 U.S. 584 (1941). Where a right is a creature of statute, herein the right to sue, and the statute provides a special remedy, as Section 205(g), *infra*, provides, that remedy is exclusive. *United States v. Babcock*, 250 U.S. 328 (1919).

Section 205(g) reads in pertinent part as follows:

> Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner may allow. . . . As part of his answer the Commissioner shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Commissioner with or without remanding the case for a rehearing. The findings of the Commissioner as to any fact, if supported by substantial evidence, shall be concluding. . . .

Section 205(h) reads in pertinent part as follows:

> . . . No findings of fact or decision of the Commissioner shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner or any officer or employee

> thereof shall be brought under section 1331 or 1346 of Title 28, United States Code, to recover on any claim arising under this subchapter.

It is therefore apparent that the only judicial remedy available to an individual on a claim arising under Title II of the Act is by a civil action brought against the Commissioner of the Social Security Administration, Section 205(g), *supra*, and that such an action can be brought only in a case in which: (1) the individual was a party to a hearing before the Commissioner, i.e., an Administrative Law Judge of the Social Security Administration; (2) the Commissioner has made a "final decision" on that claim; and, (3) the individual timely commenced a civil action in the proper district court.

Social Security Administration Regulations No. 4 set forth the administrative procedures by which a claimant for benefits under the Act may obtain a "final decision" of the Commissioner. Following the initial determination on his claim, a dissatisfied claimant may obtain reconsideration thereof. 20 C.F.R. §§ 404.909, 404.920. After reconsideration he may request a hearing before an Administrative Law Judge and, in certain specific instances and upon timely request therefor, has absolute right to such hearing. 20 C.F.R. §§ 404.933, 404.936, 404.955.

Under certain circumstances, the Administrative Law Judge may dismiss a request for such hearing. 20 C.F.R. §§ 404.957, 404.959. Such dismissal is final and binding, (20 C.F.R. § 404.906), unless vacated by the Appeals Council of the Social Security Administration either on its own motion within 60 days after the Administrative Law Judge's order of dismissal or upon request by plaintiff of the Appeals Council made within 60 days of the dismissal order.

If the hearing is granted, the claimant thereafter may have the decision of the Administrative Law Judge, issued after the hearing, reviewed by the Appeals Council. To effect that review, he must make a request therefor in writing with the Social Security Administration within 60 days from the date of receipt of notice to him of the Administrative Law Judge's decision (20 C.F.R. § 404.968(a)(1)) or within the time allowed by the Appeals Council upon a written request for an extension of time and good cause shown. 20 C.F.R. § 404.968(b). In the absence of such review by the Appeals Council, the decision of the administration is final and binding upon all parties to the hearing. 20 C.F.R. § 404.955.

Under applicable regulations and practice, there is a "final decision" of the Commissioner if the Appeals Council grants a request for review of the Administrative Law Judge's decision made after a hearing and renders a decision thereon, or if the Appeals Council denies a timely request for review of an Administrative Law Judge's decision made after a hearing thereby constituting the Administrative Law Judge's decision the "final decision" of the Commissioner. Thus, only after a request is made of the Appeals Council to review the decision of the Administrative Law Judge made after a hearing and such request has been acted upon by the Appeals Council as set forth above can there be a "final decision" of the Commissioner subject to judicial review within the meaning of Section 205(g) of the Act. 20 C.F.R. § 404.981.

The Plaintiff herein has failed to pursue and exhaust those remedies with respect to his claim for benefits provided by the Act and Regulations promulgated thereunder as set forth above.

Since there has been no hearing before an Administrative Law Judge in this case, no "final decision" of the Commissioner has been rendered. Thus, there is no decision subject to judicial review pursuant to Section 205(g) of the Act, 42 U.S.C. § 405(g); *Hobby v. Hodges,* 215 F.2d 754 (10th Cir. 1954). Since a failure to exhaust administrative remedies is jurisdictional, the Court is without jurisdiction to entertain this suit. *Coy v. Folsom,* 228 F.2d 276 (3rd Cir. 1955); *Brooks v. Cohen,* 295 F.Supp. 628 (E.D. Ill. 1968); *Henderson v. Celebrezze,* 239 F.Supp. 277 (D.S.C. 1965); *Rosen v. Celebrezze,* 254 F.Supp. 280 (N.D.N.Y. 1964); *Harris v. Ribicoff,* 200 F.Supp. 318 (N.D.W.Va. 1961); *Marshall v. Flemming,* 180 F.Supp. 464 (E.D. Va. 1960).

This need for administrative exhaustion and strict application of Section 205(g) of the Act was clearly upheld in the case of *Califano v. Sanders,* 430 U.S. 99, 108 (1977).

We also agree that *205(g) cannot be read to authorize Judicial review of alleged abuses of agency discretion* in refusing to reopen claims for Social Security benefits.

The pertinent part of 205(g) provides that:

> 'Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by civil action commenced within sixty days.'

> "This provision clearly limits judicial review of a particular type of agency action, a 'final decision of the Commissioner made after a hearing' . . . Moreover, an interpretation that would allow a claimant judicial review simply by filing – and being denied – a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in 205(g) to impose a 60-day limitation upon judicial review of the Commissioner's final decision on the initial claim for benefits. 20 C.F.R. § 404.951 [recodified as 404.981, 45 F.R. 52088-98 (August 5, 1980)]. Congress determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or *belated litigation of state eligibility claims.* Our duty, of course, is to respect that choice." (Emphasis supplied.)

Only claims for benefits which are pursued through the initial, reconsideration, hearing, and Appeals Council levels in a timely fashion and have received a final decision of the Commissioner can be reviewed under 205(g) of the Act. Accordingly, where claimants do not timely request and receive Appeals Council action on a hearing decision, there is no jurisdiction for a review of the merits of the case.

Additionally, in his complaint, Plaintiff argues that the Commissioner's denial of reopening is incorrect. It is well established that the Commissioner's denial of reopening is not a final decision subject to judicial review. *Califano v. Sanders,* 430 U.S. at 108; *Davis v. Schwerker,* 665 F.2d 934, 935 (9th Cir. 1982); *Krumpelman v. Heckler,* 767 F.2d 586, 589 (9th Cir. 1985).

Accordingly, Defendant submits that this action should be dismissed.

DATED this 17th day of September, 1997.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

/s/ Carlos A. Gonzalez
CARLOS A. GONZALEZ
Assistant U.S. Attorney

OF COUNSEL:
Arthur J. Fried
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Charlotte A. Hardnett
Principal Deputy General Counsel
Jack Sacchetti
Acting Associate General Counsel
Litigation Division
Peter S. Krynski
Supervisory Attorney
Laureen Penn, Attorney
Office of the General Counsel
Social Security Administration

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ROBERT WENZEL, **264-50-3342** **Plaintiff** **vs.** **JOHN J. CALLAHAN, ACTING COMMISSIONER OF SOCIAL SECURITY,** **Defendant**	)	**CIVIL ACTION NO. CV-S-96-01063-HDM (LRL)**

DECLARATION OF WILBUR J. LAUB, CHIEF COURT CASE PREPARATION AND REVIEW BRANCH 1, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION

I, WILBUR J. LAUB, Chief, Court Case Preparation and Review Branch 1, of the Office of Appellate Operations, Office of Hearings and Appeals, administers the nationwide hearings and appeals program for the Social Security Administration. The office of Hearings and Appeals includes the Appeals Council and Administrative Law Judges who hold hearings on claims arising under Title II, of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination on his or her claim. The Office of Appellate Operations provides professional and technical advice to the Associate Commissioner and other Administrative Appeals Judges of the Appeals Council in the processing of cases in which a civil action has been filed.

(2) One function of the Appeals Council is to act on requests for review of hearing decisions made by Administrative Law Judges and to either grant, deny, or dismiss any such request. Under the regulations of the Social Security Administration, if the Appeals Council denies a timely request for review of a hearing decision, that hearing decision thereupon becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended, 42 U.S.C. section 405(g), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner may allow. * * * "

(3) Social Security Administration Regulations No. 4, section 404.988 (20 CFR 404.988), as pertinent herein, provides as follows:

> "A determination, revised determination, decision or revised decision may be reopened –
>
> (a) Within 12 months of the date of the notice of the initial determination, for any reason;
>
> (b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in section 404.989, to reopen the case; * * * "

In defining "good cause", section 404.989 of Regulations No. 4 (20 CFR 404.989) provides:

> "(a) We will find that there is good cause to reopen a determination or decision if –
>
> (1) New and material evidence is furnished;
>
> (2) A clerical error in the computation or recomputation of benefits was made; or
>
> (3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.
>
> (b) we will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made."

Section 404.903 of Regulations No. 4 (20 CFR 404.903) provides in pertinent part:

> "Administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative review process provided by this subpart, and they are not subject to judicial review. These actions include, but are not limited to, an action –
>
> (1) Denying your request to reopen a determination or a decision; * * * "

(4) I am responsible for the processing of claims under Title II of the Social Security Act, as amended, whenever a civil action has been filed in the State of Nevada (*see* 53 Fed. Reg. 29,778 (1988)). The official files maintained by the Social Security Administration relating to the claims of the plaintiff, ROBERT WENZEL, filed in 1968 and 1972 under Title II of the Social Security Act, are unavailable. The official file relating to the claim filed on August 2, 1988, is presently within my legal custody and

has been examined under my supervision. To the best of my knowledge and belief said file and other information shows that:

(a) *The Social Security Administrative Instructions Manual System* sets forth the current policy regarding the storage and destruction of inactive claim folders. The current instructions regarding the storage and destruction of inactive disability claim files are contained in section DIB-01.01.00 (Exhibit 1).

(b) *Request for Records Disposition Authority,* approved on February 3, 1988, revised the retention period to 5 years after the event date the inactive claim was denied (disallowed) or terminated. Any inactive claim file which, having already served the requisite 5-year retention period, has been destroyed (EXHIBIT 2).

(c) The claimant filed an application for disability insurance benefits in October 1968, and was found under a disability for the period October 1968 through May 1969 (see Exhibit 10).

(d) On May 21, 1974, an Administrative Law Judge issued a decision finding that the claimant is not under a disability based on the application filed September 13, 1972 (Exhibit 3, pages 7ff are unavailable).

(e) On October 2, 1974, the Appeals Council denied plaintiff's request for review of that decision. Although advised of the right to commence a civil action within 60 days of receipt of the notice, such action was not commenced (Exhibit 4).

(f) On August 2, 1988, plaintiff filed his third application for disability insurance benefits, alleging onset of disability as March 12, 1980 (Exhibit 5). This application was denied by notice dated August 14, 1988. Although advised of the right to request reconsideration of the determination within 60 days of receipt of the notice, such request was not made. Plaintiff was also advised by notice dated June 27, 1988, that he is ineligible for Supplemental Security Income (Exhibit 6).

(g) By letter dated July 13, 1992, plaintiff was advised that he last met the insured status requirements of the Act on March 31, 1977, and that there is no basis for changing the determination dated August 14, 1988 (Exhibit 7).

(h) On August 27, 1992, after a complete investigation of plaintiff's earnings record, it was affirmed that insured status was last met on March 31, 1977. Plaintiff's prior period of disability, and his earnings for 1978, 1979, and 1980 do not extend the date last insured (Exhibit 8).

(i) By letter dated September 4, 1992, plaintiff was again advised that there is no basis for reopening the prior determinations made in his case (Exhibit 9).

(j) By letter dated April 1, 1993, plaintiff was provided a narrative history of his case, an explanation of the calculation of his date last insured, and the regulatory bases for reopening prior determinations (Exhibit 10).

(k) On March 6, 1996, the Appeals Council issued an order denying plaintiff's request for an extension of time in which to commence a civil action, as well as plaintiff's request for reopening (Exhibit 11).

(l) By letter dated April 15, 1996, the Appeals Council affirmed its decision to deny plaintiff's requests (Exhibit 12).

(m) On November 15, 1996, plaintiff commenced a civil action in the United States District Court for the District of Nevada.

(n) There is no "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended, 42 U.S.C. section 405(g).

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

SEP 17 1997
DATE

/s/ Wilbur J. Laub
WILBUR J. LAUB

8/2/88

Exhibit 5

APPLICATION FOR DISABILITY INSURANCE BENEFITS

I apply for a period of disability and/or all insurance benefits for which I am eligible under title II and part A of title XVIII of the Social Security Act, as presently amended.

PART I – INFORMATION ABOUT THE DISABLED WORKER

1. (a) PRINT your name

FIRST NAME, MIDDLE INITIAL, LAST NAME
Robert M. Wenzel

(b) Enter your name at birth if different from item (a)

(c) Check (✓) whether you are
[X] Male [ ] Female

2. Enter your Social Security Number
264/50/3342

3. (a) Enter your date of birth

MONTH, DAY, YEAR
3-11-37

(b) Enter name of State or foreign country where you were born.

AL

If you have already presented, or if you are now presenting, a public or religious record of your birth established before you were age 5, go on to item 4.

(c) Was a public record of your birth made before you were age 5?

[X] Yes [ ] No [ ] Unknown

(d) Was a religious record of your birth made before you were age 5?

[X] Yes [ ] No [ ] Unknown

4. (a) What is your disabling condition? (Briefly describe the injury or illness that prevents, or has prevented, you from working.)

Blood circulation problems in left leg

(b) Is your injury or illness related to your work in any way?

[X] Yes [ ] No

5. (a) When did you become unable to work because of your disabling condition?

MONTH, DAY, YEAR
03/12/80

(b) Are you still disabled? (If "yes," go on to item 6.)
(If "No." answer (c).)
[X] Yes [ ] No

(c) If you are no longer disabled, enter the date your disability ended.

MONTH, DAY, YEAR

6. (a) Have you (or has someone on your behalf) ever filed an application for Social Security benefits, a period of disability under Social Security,

supplemental security income, or hospital or medical insurance under Medicare?

[X] Yes (If "Yes." answer (b) and (c).)

[ ] No [ ] Unknown
(If "No," or "Unknown go on to item 7.)

(b) Enter name of person on whose Social Security record you filed other application.

Self denied – no appeal pending

(c) Enter Social Security Number of person named in (b).
If unknown, check this block. [ ]
264/50/3342

7. (a) Were you in the active military or naval service (including Reserve or National Guard active duty or active duty for training) after September 7, 1939 and before 1968?

[X] Yes [ ] No
(If "Yes" answer (If "No." go on
(b) ar [copy omitted in original]

(b) Enter dates of service

FROM: (MO
08/ [copy omitted in original]

(c) Have you *ever* been (or will you be) eligible for a monthly benefit from a military or civilian Federal agency? (Include Veterans Administration benefits *only* if you waived military retirement pay)

8. (a) Have you filed (or do you intend to file) for any other public disability benefits? (Include

workers' compensation and Black Lung benefits)

[X] Yes (If "Yes," answer (b).)

[ ] No (If "No." go on to item 9.)

(b) The other public disability benefit(s) you have filed (or intend to file) for is (Check as many as apply):

[X] Veterans Administration Benefits

[ ] Supplemental Security Income

[ ] Welfare

[ ] Other (If "Other," complete a Workers' Compensation/Public Disability Benefit Questionnaire)

9. (a) Have you ever engaged in work that was covered under the social security system of a country other than the United States? (If "Yes," answer (b).) (If "No," go on to item 10.)

[ ] Yes [X] No

(b) List the country(ies):

10. (a) Are you entitled to, or do you expect to become entitled to, a pension or annuity based on your work after 1956 not covered by Social Security?

[ ] Yes (If "Yes," answer (b) and (c).)

[X] No (If "No," go on to item 11.)

(b) [ ] I became entitled, or expect to become entitled, beginning

MONTH YEAR

(c) [ ] I became eligible, or expect to become eligible, beginning

MONTH YEAR

I agree to notify the Social Security Administration if I become entitled to a pension or annuity based on my employment after 1956 not covered by Social Security, or if such pension or annuity stops.

11. Enter below the names and addresses of all the persons, companies, or Government agencies for whom you have worked this year, last year, and the year before last.
    If the above does not apply, write "NONE" below and go on to item 13.

NAME AND ADDRESS OF EMPLOYER (If you had more than one employer, please list them in order beginning with your last (most recent) employer)	Work Began		Work Ended (If still working show "Not ended")	
	MONTH	YEAR	MONTH	YEAR
None				

(If you need more space, use "Remarks" space on page 3.)

12. May the Social Security Administration or the State agency reviewing your case ask your employers for information needed to process your claim?

    [X] Yes [ ] No

13. THIS ITEM MUST BE COMPLETED, EVEN IF YOU WERE AN EMPLOYEE.

    (a) Were you self-employed this year, last year, or the year before?

(If "Yes," answer (b).) (If "No," go on to item 14.)

[ ] Yes [X] No

(b) Check the year or years in which you were self-employed

In what kind of trade or business were you self-employed? (For example, storekeeper, farmer, physician)

Were your net earnings from your trade or business $400 or more? (Check "Yes" or "No")

[ ]	This year		
[ ]	Last Year	[ ] Yes	[ ] No
[ ]	Year before last	[ ] Yes	[ ] No

14. (a) How much were your total earnings last year? (Count both wages and self-employment income. If none, write "None.")

Amount $ None

(b) How much have you earned so far this year? (If none, write "None.")

Amount $ None

(c) Did you receive any money from an employer(s) on or after the date in item 5(a) when you became unable to work because of your disability? (If "Yes," give amounts and explain in "Remarks" on page 4.)

[ ] Yes [X] No
Amount $

(d) Do you expect to receive any additional money from an employer such as sick pay, vacation pay, other special pay?

(If "Yes," please give amounts and explain in "Remarks" on page 4.)

[ ] Yes [X] No
Amount $____________

PART II – INFORMATION ABOUT THE DISABLED WORKER AND SPOUSE

15. Have you ever been married?

[X] Yes [ ] No

(If "Yes," answer item 16.) (If "No," go on to item 17.)

16. (a) Give the following information abut your current marriage. If not currently married, show your last marriage below.

To whom married
Teruko Nakajima

When (Month, day, year)
4-10-75

Where (Name of City and State)
Honolulu HI

Your current or last marriage

How marriage ended (If still in effect, write "Not ended."

When (Month, day, year)

Where (Name of City and State)

Marriage performed by
[X] Clergyman or public official
[ ] Other (Explain in Remarks)

Spouse's date of birth (or age)
12-9-46

If spouse deceased, give date of death

Spouse's Social Security Number (If none or unknown, so indicate)

228/11/0533

(b) Give the following information about each of your previous marriages. **(If none, write "None.")**

To whom married

No Others

When (Month, day, year)

Where (Name of City and State)

Your previous marriage

How marriage ended

When (Month, day, year)

Where (Name of City and State)

Marriage performed by:
[ ] Clergyman or public official
[ ] Other (Explain in Remarks)

Spouse's date of birth (or age)

If spouse deceased, give date of death

Spouse's Social Security Number (If none or unknown, so indicate)

—— — ——

(Use a separate statement for information about any other marriages.)

17. Have you or your spouse worked in the railroad industry for 7 years or more?

[ ] Yes [X] No

PART III – INFORMATION ABOUT THE DEPENDENTS OF THE DISABLED WORKER

18. If your claim for disability benefits is approved, your children (Including natural children, adopted children, and stepchildren) or dependent grandchildren (including stepgrandchildren) may be eligible for benefits based on your earnings record.

    List below FULL NAME OF ALL such children who are now or were in the past 12 months UNMARRIED and:

    - UNDER AGE 18
    - AGE 18 TO 19 AND ATTENDING SECONDARY SCHOOL
    - DISABLED OR HANDICAPPED

(age 18 or over and disability began before age 22)

(IF THERE ARE NO SUCH CHILDREN, WRITE "NONE" BELOW AND GO ON TO ITEM 19.)

Charles Anthony Wenzel 12-22-75

Anson Blair Wenzel 3-15-79

19. Do you have a dependent parent who was receiving at least one-half support from you when you became unable to work because of your disability? (If "Yes," enter name and address in "Remarks" on page 4.)

    [ ] Yes [X] No

IMPORTANT INFORMATION ABOUT DISABILITY INSURANCE BENEFITS – PLEASE READ CAREFULLY

I. **SUBMITTING MEDICAL EVIDENCE:** I understand that as a claimant for disability benefits, I am responsible for providing medical evidence showing the nature and extent of my disability. I may be asked either to submit the evidence myself or to assist the Social Security Administration in obtaining the evidence. If such evidence is not sufficient to arrive at a determination, I may be requested by the State Disability Determination Service to have an independent examination at the expense of the Social Security Administration.

II. **RELEASE OF INFORMATION:** I authorize any physician, hospital, agency or other organization to disclose to the Social Security Administration, or to the State Agency that may review my claim or continuing disability, any medical record or other information about my disability.

I also authorize the Social Security Administration to release medical information from my records, only as necessary to process my claim, as follows:

- Copies of medical information may be provided to a physician or medical institution prior to my appearance for an independent medical examination if an examination is necessary.

- Results of any such independent examination may be provided to my personal physician.

- Information may be furnished to any contractor for transcription, typing, record copying, or other related clerical or administrative service performed for the State Disability Determination Service.

- The State Vocational Rehabilitation Agency may review any evidence necessary for determining my eligibility for rehabilitative services.

THIS MUST
BE
ANSWERED ➡ 20. DO YOU UNDERSTAND ANY AGREE WITH THE AUTHORIZATIONS GIVEN ABOVE?
[X] Yes [ ] No (If "No," explain why in "Remarks.")

REMARKS (You may use this space for any explanation. If you need more space, attach a separate sheet.)

III. **REPORTING RESPONSIBILITIES**: I agree to promptly notify Social Security if:

- My MEDICAL CONDITION IMPROVES so that I would be able to work even though I have not yet returned to work.
- I GO TO WORK whether as an employee or a self-employed person.
- I apply for or receive a decision on benefits under any WORKERS' COMPENSATION law or plan (including Black Lung benefits from the Department of Labor), or other public benefit based on disability.
- I am imprisoned for conviction of a felony.

The above events may affect my eligibility to disability benefits as provided in the Social Security Act, as amended.

I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law by fine, imprisonment or both. I affirm that all information I have given in this document is true.

SIGNATURE OF APPLICANT

Signature (First name, middle initial, last name) (Write in ink)

SIGN HERE ➡ /s/ Robert M. Wenzel

Date (Month, day, year)

August 1, 1988

Telephone Number(s) at which you may be contacted during the day. (Include the area code)

702 458-0694

Mailing Address (Number and street, Apt. No., P.O. Box, or Rural Route) (Enter residence address in "Remarks" if different)

3989 Cedaredge Ct

City and State
Las Vegas NV

ZIP Code 89120

Enter Name of County (if any) in which you now live
Clark

Witnesses are required ONLY if this application has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the applicant must sign below, giving their full addresses. Also, print the applicant's name in the Signature block.

1. Signature of Witness

Address (Number and street, City, State, and ZIP Code)

2. Signature of Witness

Address (Number and street, City, State, and ZIP Code)

Supplemental Security Income Information

From: Department of Health and Human Services
Social Security Administration

Date: June 27, 1988

Robert M. Wenzel
3989 Cedaredge Ct
Las Vegas Nv 89120

On June 27, 1988, we discussed eligibility for payments from the supplemental security income program with

This letter is an informal decision on your eligibility for supplemental Security Income only. This does not affect your entitlement to Social Security benefits or Medicare.

We believe that, according to your statements, you are not eligible to receive supplemental security income benefits at this time because:

[ ] You are not age 65 and neither blind nor disabled.

[ ] You are neither a U.S. citizen nor lawfully-admitted alien or alien residing in the U.S. under color of law.

[X] Your monthly income of about $1598.00 is too high for any payment in this State.

[ ] Your personal/you and your spouse's resources of about $ ___ are more than the allowable limit of $ ___

[ ] You were not interested in filing a claim.

[ ] You have not signed and returned the application which was completed with you

over the telephone. To become eligible for payment, a signed application must be received by a Social Security office.

[ ] Other.

If you want a formal decision about your eligibility for supplemental security income, or believe that our information is incorrect or incomplete, you should file an application. You may file an application at any time. However, the date of this inquiry may be used as your filing date only if you file by August, 1988. If you do not file by this date, you may lose payments because of the limitation on the retroactivity of formal applications for supplemental security income.

If you have any questions about this letter, please telephone or visit any Social Security office. If you call in person, please take this letter with you.

KATHRYN E. LANDRETH
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Assistant United States Attorney
701 East Bridger, 8th Floor
Las Vegas, Nevada 89101
Telephone: (702) 388-6336

Attorneys for Defendant
Social Security Administration

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-oOo-

ROBERT WENZEL, SSN: 264-50-3342	CV-S-96-01063-HDM-(LRL)
Plaintiff,	DEFENDANT'S MOTION TO VACATE THIS HONORABLE COURT'S ORDER OF APRIL 24, 1997, AND TO REOPEN THE INSTANT CIVIL ACTION
v.	
JOHN J. CALLAHAN, Acting Commissioner of Social Security Administration,	
Defendant.	

COMES NOW, Defendant John J. Callahan, Acting Commission of Social Security Administration, by and through his attorneys, Kathryn E. Landreth, United States Attorney for the District of Nevada, and Carlos A. Gonzalez, Assistant United States Attorney, and moves this Honorable Court for an order vacating its Order of April 24, 1997, and reopening the instant civil action.

STATEMENT OF THE CASE

On or around November 18, 1996, Plaintiff filed his Complaint against Defendant.

Due to defective service of the original Complaint, Plaintiff again served the Defendant on February 19, 1997.

On or around March 6, 1997, Defendant filed his Motion for Remand to allow time to locate and/or reconstruct Plaintiff's missing administrative file.

This Honorable Court granted Defendant's Motion on April 24, 1997.

Defendant has now located Plaintiff's official administrative file relating to his claim file on August 2, 1988.

In the interest of judicial economy and, moreover, in the interest of justice, it is respectfully requested that the instant litigation be reopened for a final adjudication rather than force Plaintiff to refile his complaint thereby incurring court costs due to circumstances beyond his control.

Simultaneously with this Motion, Defendant is filing his Motion To Dismiss.

DATED this 17th day of September, 1997.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

/s/ Carlos A. Gonzalez
CARLOS A. GONZALEZ
Assistant U.S. Attorney

No. 98-15857

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. WENZEL,
Plaintiff-Appellant
v.
KENNETH S. APFEL,
Commissioner of Social Security,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR DEFENDANT-APPELLEE

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ATTORNEYS FOR DEFENDANT-APPELLEE

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No. 98-15857

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. WENZEL,
Plaintiff-Appellant
v.
KENNETH S. APFEL,
Commissioner of Social Security,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR DEFENDANT-APPELLEE

I. STATEMENT OF THE ISSUE

Whether the district court properly dismissed plaintiff-appellant's complaint for lack of jurisdiction over the subject matter of the cause of action.

II. STATEMENT OF JURISDICTION

The district court had no jurisdiction under 42 U.S.C. § 405(g) to review the Commissioner's denial of plaintiff-appellant's request to reopen his prior final decision and to extend the time limit for filing a civil action. The district court's order dismissing the action was entered on February 24, 1998. Plaintiff-appellant's notice of appeal was timely filed on April 22, 1998. This Court has jurisdiction to review the district court's order pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF THE CASE

On November 15, 1996, plaintiff-appellant, Robert M. Wenzel (plaintiff), filed a complaint in the United [sic] District Court for the District of Nevada alleging jurisdiction under 42 U.S.C. § 405(g) and Federal Rules of Civil Procedure 8(a)-(e), seeking judicial review of the Commissioner's denial of his request to reopen his claim for Social Security disability benefits and to extend the time limit for filing a civil action. The Secretary filed a motion to dismiss asserting that the district court lacked jurisdiction to entertain the cause of action because plaintiff failed to exhaust his administrative remedies and did not obtain a "final decision" of the Commissioner as required under 42 U.S.C. § 405(g). The district court, in an order entered February 24, 1998, granted the Commissioner's motion and dismissed the action. This appeal follows.

IV. STATEMENT OF FACTS

The facts of this case, as found by the district court, are as follows: Plaintiff filed an application for disability insurance benefits in October 1968. It was determined that plaintiff was disabled from October 1968 through May 1969. Plaintiff filed a second application for disability insurance benefits in September 1972, which was denied at the initial, reconsideration and hearing levels. In October 1974, the Appeals Council denied plaintiff's request for review, thereby rendering the hearing decision the "final decision" of the Commissioner. Plaintiff did not seek judicial review of the Commissioner's final decision.

Plaintiff filed a third application for disability insurance benefits in August 1988, alleging disability as of March 1980. On August 14, 1988, plaintiff was notified that his application was denied because he failed to meet the special earnings requirement of the Social Security Act. The notice advised plaintiff of his right to request reconsideration within 60 days of receipt of the notice; however, plaintiff did not seek reconsideration.

Plaintiff corresponded several times with the Social Security Administration (SSA) concerning his eligibility to receive disability insurance benefits. Most recently, on January 4, 1993, plaintiff inquired about his claim for benefits and the conditions under which a final decision may be reopened. On April, 1993, plaintiff received a response from SSA which provided a narrative history of his case, an explanation of the calculation of his date last insured, and the regulatory basis for reopening a prior determination.

On September 30, 1995, plaintiff requested that SSA reopen its previous determinations, or in the alternative, grant an extension of time in which to file a civil action. On March 6, 1996, the Appeals Council denied plaintiff's requests. Subsequently, plaintiff again requested reopening and an extension of time. On April 15, 1996, the Appeals Council again denied plaintiff's requests. Plaintiff filed his civil action on November 15, 1996.

V. SUMMARY OF THE ARGUMENT

The district court's dismissal of the civil action was correct because it lacked jurisdiction to review the Commissioner's discretionary denial of plaintiff's request for reopening and extension of time. The caselaw of this Circuit is very clear that unless a claimant exhausts his administrative remedies and obtains a "final decision," the district court is without jurisdiction to review an action of the Commissioner under 42 U.S.C. § 405(g). Plaintiff's failure to exhaust his administrative remedies and obtain a "final decision" in this case deprived the district court of jurisdiction. In addition, the Commissioner's discretionary refusal to reopen plaintiff's claim and extend the time limit for filing a civil action is not subject to judicial review. Accordingly, the Commissioner's actions and the district court's dismissal of the civil action were correct.

VI. ARGUMENT

A. The Failure of Plaintiff to Exhaust His Administrative Remedies and Obtain a "Final Decision" Barred the District Court from Reviewing This Action

It is well settled that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *Lehman v. Nakshian*, 453 U.S. 156, 160 (1980), *quoting United States v. Testan*, 424 U.S. 392, 399 (1976), and *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941). Conditions on the waiver of sovereign immunity must be strictly construed. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Block v. North Dakota*, 461 U.S. 273, 287 (1983).

Judicial review of the final decisions on claims arising under Title II or Title XVI of the Social Security Act is provided for and limited by sections 205(g) and (h) of said Act, 42 U.S.C. § 405(g) and (h). The relevant provisions of section 205 read as follows:

> (g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow * * * *
>
> (h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. *No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.* No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on many claims arising under this subchapter" (emphasis supplied).

It is clear from these provisions of the Social Security Act that the only civil action permitted on any claim arising under Title II or Title XVI of the Social Security Act is an action to review the "final decision of the Secretary made after a hearing." *Califano v. Sanders*, 430 U.S. 99, 108 (1977); *Hoye v. Sullivan*, 985 F.2d. 990, 991 (9th Cir. 1992). The term "final decision" is undefined in the

Act, but "its meaning is left to the Secretary to flesh out by regulations." *Weinberger v. Salfi,* 422 U.S. 749, 766 (1975). Under the Act, the authority to determine what constitutes a "final decision" ordinarily rests with the Secretary since the Secretary has ultimate responsibility for the integrity of the administrative program. *Mathews v. Eldridge,* 424 U.S. 319, 330 (1976). The Social Security Act and the Commissioner's implementing regulations provide the procedural framework for seeking administrative and judicial review of disability claims. Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a State agency, pursuant to regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. §§ 421(a), 1383b(a). If the State agency determines that a new applicant is not disabled or that the disability of a current recipient has ceased, the individual may request a *de novo* reconsideration by the State agency. The claimant is informed that he must request reconsideration within 60 days of his receipt of the adverse initial determination, 20 C.F.R. §§ 404.904, 404.909(a)(1), 416.1404, 416-1409(a), and that determination becomes binding upon him if he does not do so. 20 C.F.R. §§ 404.905, 416.1405.

If an individual is dissatisfied with the State agency's decision after reconsideration, he "shall be entitled to a hearing thereon by the Secretary." 42 U.S.C. § 421(d); *see also* 42 U.S.C. § 1383(c)(1). The Act requires, and the claimant is notified, that he must request a hearing before an ALJ within 60 days of his receipt of the State agency's reconsideration decision. 42 U.S.C. §§ 405(b)(1), 13, 81(c)(1). The latter decision is binding upon the claimant if he does not timely request an ALJ hearing. 20 C.F.R. §§ 404.920, 404.921(a), 404.933(b), 416.1420, 416.1421(a), 416.1433(b). If the ALJ's decision is adverse to the claimant, he then may seek review by the Appeals Council. If a claimant does not request such review within 60 days, the adverse ALJ decision is binding. 20 C.F.R. §§ 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468. The claimant is informed that he must seek Appeals Council review within 60 days. It is only after the Appeals Council has denied review, or has granted review and issued its own decision, that the Secretary has rendered a "final decision" on the individual's claim for benefits, which then is subject to judicial review pursuant to 42 U.S.C. § 405(g). If a claimant does not seek judicial review of that determination, it is binding on the claimant. *See* 42 U.S.C. §§ 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210. 42 U.S.C. § 405(g) provides that a claimant must commence a civil action within 60 days after the mailing to him of the Secretary's final decision. *See Bowen v. City of New York,* 476 U.S. at 471-472; *Heckler v. Day,* 467 U.S. 104, 106-107 (1984). Accordingly, the district court was correct in holding that plaintiff's failure to timely seek judicial review of his second application renders that determination final and bars plaintiff from now seeking judicial review of that final decision.

It is well settled that a claimant's failure to exhaust administrative remedies set forth in 42 U.S.C. § 405(g) and the implementing regulations deprives the district court of jurisdiction. *Hoy,* 985 F.2d at 991; *Bass v. Social Security Administration,* 872 F. 2d 832, 833 (9th Cir 1989); *Hironymous v. Bowen,* 800 F.2d 888, 894 (9th Cir. 1986). In this case, therefore, the district court was correct in holding that plaintiff's failure to seek reconsideration of his third application and exhaust his administrative remedies bars judicial review of his claim.

B. The Discretionary Decision of the Commissioner Denying Plaintiff's Request to Reopen His Claim and to Extend the Time for Seeking Judicial Review is Not Subject to Judicial Review

The district court was correct in holding that the Commissioner's discretionary refusal to consider plaintiff's request to reopen his prior claim and to extend the time for seeking judicial review is not subject to judicial review. The Secretary's regulations provide that a "final decision" which is subject to judicial review is available only when a claimant has received an "initial determination" as has pursued that determination through the administrative appellate process. 20 C.F.R. §§ 404.900(a), 416.1400(a). An "initial determination" is defined in the regulations as "a determination made by SSA about entitlement or continuing entitlement to benefits, or about any other matter discussed in section [404.902 and 416.1402] that gives you a right to further review." 20 C.F.R. §§ 404.900(a)(1), 416.1400(a)(1). The regulations list those administrative actions which are not "initial determinations", and specifically provide that the denial of a request for extension of time for requesting review and denial of a request to reopen a decision are not "initial determination" and are not subject to judicial review. 20 C.F.R. §§ 404.903(j), (1); 416.1403(a)(5), (8).

Moreover, in *Califano v. Sanders, supra,* the Supreme Court held that neither section 10 of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, nor section 205(g) of the Social Security Act grants district courts jurisdiction to review a discretionary decision of the Secretary not to reopen a previously adjudicated claim for Social Security benefits. The Supreme Court held that 42 U.S.C. § 405(g) "clearly limits judicial review to a particular type of agency action, a 'final decision of the Secretary made after a hearing.' But a petition to reopen a prior final decision may be denied without a hearing as provided in . . . § 405(b)." 403 U.S. at 108. This Court, in applying the rule enunciated in *Califano v. Sanders,* has held that in circumstances virtually identical to those presented in this case, a district court has no jurisdiction to review the Secretary's discretionary refusal to reopen a claim which has become administratively final, to consider an untimely request for review or to grant an extension of time to seek review unless a colorable constitutional violation is alleged. *Matlock v. Sullivan,* 908 F.2d 492, 493 (1990); *Taylor v. Heckler,* 765 F.2d 872, 877 (1985); *Singer v. Schweiker,* 694 F.2d 616, 617 (1982); *Peterson v. Califano,* 631 F.2d 628, 630 (1980). Plaintiff's due process claim (at p.4 of his informal brief) is totally without any substantiation and is entirely meritless. Thus, the constitutional claim clearly is not colorable and "is made solely for the purpose of obtaining jurisdiction". *Hoye v. Sullivan,* 985 F.2d at 991-992. Accordingly, the district court's action dismissing the civil action for lack of jurisdiction was correct and consistent with the caselaw of this Circuit.

CONCLUSION

For the reasons stated herein, the Commissioner submits that the district court's dismissal of plaintiff's cause of action was correct and respectfully requests that this Court affirm the action of the district court.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

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General Counsel,
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/s/ Etzion Brand
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ATTORNEYS FOR
DEFENDANT-APPELLEE

STATEMENT OF RELATED CASES

There are no cases related to this case pending before this Court.

No.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MARSHALL WENZEL, Petitioner,

v.

Commissioner of Social Security
KENNETH STEVEN APFEL, Respondent

APPENDIX C

Plaintiff Exhibits 4, 16, 17, 19, and 20 were submitted with Complaint of November 15, 1996 in:

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT M. WENZEL, Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security, Defendant.

No. CV-S-96-01063-HDM(LRL)

APPENDIX C INDEX

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Narrative (Pl. Ex. 17)...........................App. 125

Petition (Pl. Ex. 16)............................App. 157

Letter and Attachment (Pl. Exs. 19, 20)........App. 159

8/1/88

DISABILITY REPORT

PLEASE PRINT, TYPE, OR WRITE CLEARLY AND ANSWER ALL ITEMS TO THE BEST OF YOUR ABILITY. If you are filing on behalf of someone else, enter his or her name and social security number in the space provided and answer all questions. COMPLETE ANSWERS WILL AID IN PROCESSING THE CLAIM.

PRIVACY ACT NOTICE: The information requested on this form is authorized by Title 20 CFR 404.1512 and Title 20 CFR 416.912. The information provided will be used in making a decision on your claim. While completion of this form is voluntary, failure to provide all or part of the requested information could prevent an accurate or timely decision on your claim and could result in the loss of some benefits. Information you furnish on this form may be disclosed by the Social Security Administration to another person or governmental agency only with respect to social security programs and to comply with Federal laws requiring the exchange of information between Social Security and another agency.

A. NAME OF CLAIMANT

Robert Marshall Wenzel

B. SOCIAL SECURITY NUMBER

264/50/3342

C. TELEPHONE NUMBER where you can be reached (include area code)

(702) 458-0694

D. WHAT IS YOUR DISABLING CONDITION? *(Briefly explain the injury or illness that stops you from working.)*

Impeded blood circulation in left leg. Swelling and skin deterioration with pain ranging from preoccupying to intolerable is avoided only by raising the leg frequently and rubbing downward blood that accumulates in the permanent ulcer/stasis dermatitis area in the lower leg.

PART I – INFORMATION ABOUT YOUR CONDITION

1. When did your condition first bother you:

MONTH	DAY	YEAR
03	07	68

2A. Did you work after the date shown in item 1? *(If "no", go on to items 3A and 3B.)*

[X] YES [ ] NO

2B. If you did work since the date in item 1, did your condition cause you to change –

Your job or job duties? [X] YES [ ] NO

Your hours of work? [X] YES [ ] NO

Your attendance? [X] YES [ ] NO

Anything else about your work? [X] YES [ ] NO

(If you answered "no" to all of these, go to items 3A and 3B.)

2C. If you answered "yes" to any item in 2B, explain below what the changes in your work circumstances were, the dates they occurred, and how your condition made these changes necessary.

When my job duties involved standing or walking there was, support-stocking or no, almost immediate aggravation of the condition. When they involved sitting there was a similar if slower effect: it does not take long for a healthy leg, when crossed or propped on a desk, to "go to sleep." My only relief was gained by the measures described in D. above and 3B. below. My job attendance and hours of work were thus adversely affected, as was my ability to give undistracted attention to my duties when on the job. This was an attendant condition in all my attempts to work from 1970 to 1980.

3A. When did your condition finally make you stop working?

MONTH	DAY	YEAR
03	12	80

3B. Explain how your condition now keeps you from working.

After my leg has been below my torso for about an hour it becomes, whether I have been standing, walking, or sitting, incapacitating. I must lie prone, raise the leg straight up or nearly so and rub the afflicted are for, depending on the prior activity, twenty to forty minutes.

Form SSA-3368-F8 (7-85) Use prior editions until supply is exhausted

PART II – INFORMATION ABOUT YOUR MEDICAL RECORDS

4. List the name, address and telephone number of the doctor who has the latest medical records about your disabling condition.

If you have **no** doctor check [ ]

NAME

554 OSW/Hospital
Nellis Air Force Base

ADDRESS

Las Vegas, Nv.
89191

TELEPHONE NUMBER (includes area code)

Records Office: (702) 652-4424

HOW OFTEN DO YOU SEE THIS DOCTOR?

whenever condition warrants

DATE YOU **FIRST** SAW THIS DOCTOR

03 07 68

DATE YOU **LAST** SAW THIS DOCTOR

07 15 88

REASONS FOR VISITS *(show illness or injury for which you had an examination or treatment)*

On 03 07 68 sustained injuries from enemy B-40 rocket while patrolling the Ben Tre Canal in the Mekong Delta of Vietnam. These included a shattered left eardrum, a broken left femur, and an extensive artery, vein, nerve, and muscle loss in upper left leg.

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

Surgery for removal of shrapnel and damaged tissue; physical therapy and whirlpool during thirteen-month hospitalization; surgery for eardrum toward end of hospitalization; and periodic antibiotic/UNA Boot treatments and support stocking issuances thereafter.

5A. Have you seen any other doctors since your disabling condition began?
If "yes", show the following:
[X] YES [ ] NO

NAME Veterans Administration
Medical Center

ADDRESS 1000 Locust Street
Reno, Nv.
89520

TELEPHONE NUMBER (include area code)

Records Office: (702) 786-7200

HOW OFTEN DO YOU SEE THIS DOCTOR?

as required

DATE YOU **FIRST** SAW THIS DOCTOR

09 10 69

DATE YOU **LAST** SAW THIS DOCTOR

07 20 88

REASONS FOR VISITS *(show illness or injury for which you had an examination or treatment)*

The injuries of 03 07 68.

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

All treatments and medicines have been provided by military and naval doctors. I have been extensively evaluated by the VA for the receipt of disability compensation and vocational-rehabilation [sic].

5B. Identify below any other doctor you have seen since your illness or injury began.

NAME ADDRESS

TELEPHONE NUMBER (include area code)

HOW OFTEN DO YOU SEE THIS DOCTOR?

DATE YOU **FIRST** SAW THIS DOCTOR

DATE YOU **LAST** SAW THIS DOCTOR

REASONS FOR VISITS *(show illness or injury for which you had an examination or treatment.)*

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

6A. Have you been hospitalized or treated at a clinic for your disabling condition?
If "yes", show the following:
[ ] YES [ ] NO

NAME OF HOSPITAL OR CLINIC

Various military and naval hospitals at times described in medical record and Attachment.

PATIENT OR CLINIC NUMBER

USN service number: 443 56 24

WERE YOU AN INPATIENT? (stayed at least overnight?)

[X] YES [ ] NO
(If "yes", show:)

WERE YOU AN OUTPATIENT?

[X] YES [ ] NO
(If "yes", show:)

DATES OF ADMISSIONS

DATES OF DISCHARGES

DATES OF VISITS

REASON FOR HOSPITALIZATION OR CLINIC VISITS

(show illness or injury for which you had an examination or treatment.)

The injuries of 03 07 68.

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illnesses or injury, if known. If no treatment or medicines, show "NONE".)

As described in 4.

6B. If you have been in other hospital or clinic for your illness or injury, identify it below.

NAME OF HOSPITAL OR CLINIC ADDRESS

PATIENT OR CLINIC NUMBER

WERE YOU AN INPATIENT? (stayed at least overnight?)

[ ] YES [ ] NO *(If "yes", show:)*

WERE YOU AN OUTPATIENT?

[ ] YES [ ] NO *(If "yes", show:)*

DATES OF ADMISSIONS DATES OF DISCHARGES

DATES OF VISITS

REASON FOR HOSPITALIZATION OR CLINIC VISITS *(show illness or injury for which you had an examination or treatment.)*

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

If you have been in other hospitals or clinics for your illness or injury, list the names, addresses, patient or clinic numbers, dates and reasons for hospitalization or clinic visits in Part VI.

7. Have you been seen by other agencies for your disabling condition?
   (VA, Workmen's Compensation, Vocational Rehabilitation, Welfare, etc.) [X] YES [ ] NO

   (If "yes," show the following:)

NAME OF AGENCY ADDRESS

Various VA hospitals and clinics at times described in VA record and Attachment.

YOUR CLAIM NUMBER

24 808 429

DATE OF VISITS

TYPE OF TREATMENT, EXAMINATION OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

An audio test; physical examinations for determinance of loss of strength and range-of-motion, nerve disorder, and attendant circulation problems in leg; psychological aptitude tests and an optometric test.

If more space is needed, list the other agencies, their addresses, your claim numbers, dates, and treatment received in Part VI.

8. Have you had any of the following tests in the last year?

	CHECK APPROPRIATE BLOCK OR BLOCKS	IF "YES" SHOW	
TEST		WHERE DONE	WHEN DONE
Electrocardiogram	[ ] YES [X] NO		
Chest X-Ray	[ ] YES [X] NO		
Other X-Ray (name body part here)	[ ] YES [X] NO		
Breathing Tests	[ ] YES [X] NO		
Blood Tests	[ ] YES [X] NO		
Other (Specify) optometric test for reissuance of eyeglasses	[X] YES [ ] NO	Las Vegas VA Clinic	07 20 88

9. If you have a medicaid card, what is your number (some hospitals and clinics file your records by your medicaid number.)

PART III – INFORMATION ABOUT YOUR ACTIVITIES

10. Has your doctor told you to cut back or limit your activities in any way?

    [X] YES [ ] NO

    If "yes," give the name of the doctor below and tell what he or she told you about cutting back or limiting your activities.

Dr. Anthony Moran at Nellis AFB issued crutches to me on 07 12 88 and advised that no weight be placed on my left leg until completion of present (anticipated thirty-day) UNA Boot treatment.

This treatment is by Dr. Byron Gwinn II, vascular surgeon who visits Nellis twice a month. His resident office is at Sunrise Medical Tower III, Suite 370 3006 South Maryland Parkway Las Vegas, Nv. 89109 tel. (702) 733-8952.

11. Describe your daily activities in the following areas and state what and how much you do of each and how often you do it: (before present limitation:)

- **Household maintenance** (including cooking, cleaning, shopping, and odd jobs around the house as well as any other similar activities):

Every two or three days I vacuum/sweep for forty-five minutes to an hour. Once a week I bring in groceries and twice a week take out garbage. Every ten to twelve days I mow the yard for about thirty minutes. I do associated daily odd jobs, most often in twenty-to-thirty-minute intervals, for two or three hours.

- Recreational activities and hobbies (hunting, fishing, bowling, hiking, musical instruments, etc.):

  I read three or four hours a day.

- Social contacts (visits with friends, relatives, neighbors):

  I make a social contact perhaps once a week.

- **Other** (drive car, motorcycle, ride bus, etc.)

  I drive a car for fifteen-to-thirty-minutes two or three times a week.

PART IV – INFORMATION ABOUT YOUR EDUCATION

12. What is the highest grade of school that you completed and when?

    five years college – August, 1979

13. Have you gone to trade or vocational school or had any type of special training? *If "yes," show:*

    [ ] YES [X] NO

    - The type of trade or vocational school or training:
    - Approximate dates you attended:
    - How this schooling or training was used in any work you did:

PART V – INFORMATION ABOUT THE WORK YOU DID

14. List all jobs you have had in the last 15 years before you stopped working, beginning with your usual job. Normally, this will be the kind of work you did the longest. (If you have a 6th grade education or less, AND did only heavy unskilled labor for 35 years or more, list all of the jobs you have had since you began to work. If you need more space, use Part VI.)

JOB TITLE (Be sure to begin with your usual job)	TYPE OF BUSINESS	DATES WORKED (month and Year) FROM	TO	DAYS PER WEEK	RATE OF PAY (Per hour, day, week, month or year)
Radarman First Class (E-6)	U.S. Navy	03 65	03 68	vs.	4,750 yr.
Security guard	ski lodge	12 71	04 72	5	2.50 hr.
Personnel Mgt. Spec. I	university administration	06 78	11 78	5	788 mo.
telephone surveyor	city/federal housing survey	03 79	06 79	5	650 mo.
census taker	federal census	02 80	03 80	5	715 mo.

[____]: approximations as best recalled. See Attachment.

15A. Provide the following information for your usual job shown in item 14, line 1.

In your job did you:

- Use machines, tools, or equipment of any kind?
  [X] Yes [ ] No
- Use technical knowledge or skills?
  [X] Yes [ ] No
- Do any writing, complete reports, or perform similar duties?
  [X] Yes [ ] No
- Have supervisory responsibilities?
  [X] Yes [ ] No

15B. Describe your basic duties (explain what you did and how you did it) below. Also, explain all "Yes" answers by giving a FULL DESCRIPTION of: the types of machines, tools, or equipment you used and the exact operation you performed; the technical knowledge or skills involved; the type of writing you did, and the nature of any reports; and the number of people you supervised and the extent of your supervision:

In 1965 (my eleventh year of naval service) I was a Radarman (since redesignated Operations Specialist) First Class assigned to the Master At Arms force aboard guided missile cruiser Providence. The MAA force is a ship's military police equivalent, thus my basic duties were the enforcement of the rules and regulations. My immediate senior was the Chief MAA; there were four others that I supervised. Every fifth day I was the Duty MAA, and thereby charged with maintaining the MAA Log, an account of all proceedings in which the MAAs were involved.

In 1966 I returned to my regular station as watchstander in the ship's Combat Information Center. Here I operated (did not repair) such equipment as surface and air search and height-finding radars, electronic-countermeasure devices, and electronic navigational aids; plotted friendly and unknown contact tracks and associated data (continued in Attachment)

15C. Describe the kind and amount of physical activity this job involved during typical day in terms of:

- **Walking** (circle the number of hours a day spent walking) –
  0 [✓ 1] 2 3 4 5 6 7 8
- **Standing** (circle the number of hours a day spent standing) –
  0 1 2 3 4 [✓ 5] 6 7 8
- **Sitting** (circle the number of hours a day spent sitting) –
  0 1 [✓ 2] 3 4 5 6 7 8
- **Bending** (circle how often a day you had to bend) –
  Never - Occasionally - Frequently - [✓ Constantly]
- **Reaching** (circle how often a day you had to reach) –
  Never - Occasionally - Frequently - [✓ Constantly]
- **Lifting and Carrying:** Describe below what was lifted, and how far it was carried. Check heaviest weight lifted, and weight frequently lifted and/or carried:

I carried cleaned/repaired weapons – .50-caliber machine guns, M-60 machine guns, MK-18 grenade launchers, and smaller arms – ten to fifty feet onto a river patrol boat.

HEAVIEST WEIGHT LIFTED
- [ ] 10 lbs.
- [ ] 20 lbs.
- [ ] 50 lbs.
- [ ] 100 lbs.
- [X] Over 100 lbs.

WEIGHT FREQUENTLY LIFTED/CARRIED
- [ ] Up to 10 lbs.
- [ ] Up to 25 lbs.
- [X] Up to 50 lbs.
- [ ] Over 50 lbs.

PART VI - REMARKS

Use this section for additional space to answer any previous questions. Also use this space to give any additional information that you think will be helpful in making a decision in your disability claim, (such as information about other illnesses or injuries not shown in Parts I and II.) Please refer to the previous items by number.

See Attachment for continuation of 15B, and amplifications of 6A, 7, and 14.

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.

NAME (Signature of claimant or person filing on the claimant's behalf)

SIGN HERE ➨ /s/ Robert M. Wenzel

DATE August 1, 1988

Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the person making the statement must sign below, giving their full addresses.

1. Signature of Witness
Address (Number and street, city, state, and ZIP code)

2. Signature of Witness
Address (Number and street, city, state, and ZIP code)

Attachment

to Disability Report of Robert Marshall Wenzel 264 50 3342

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continuation:

15B. on display boards and relayed to bridge and any accompanying ships; ascertained maneuvering-board triangulation solutions for contacts' courses and speeds and own ship's c/s requirements during formation maneuvers; employed standard terminology and procedure in radio/telephone communication; obtained pertinent information from *Naval War Publications* and, as appropriate, encoded or decoded same for or from r/t transmission; and provided navigation assistance during night or low-visibility operations. Under a C-I-C watch-officer, I was a watch-supervisor, responsible for the assignment and performance of about ten people, and for the entry of all notable happenings in the *C-I-C Log*.

In early April, 1967, I began training in the riverine warfare program; in late May I arrived in Vietnam.

As a river patrol boat captain, commanded a 31-foot fiber glass water-jet-powered cruiser equipped with radio and radar and primary armament of three .50-caliber machine guns. I operated the PBR in a two-boat patrol under the lead of the patrol officer, and supervised my own gunner, engineman, and seaman. I maintained the boat equipment maintenance logs.

As a patrol officer, undertook assigned missions with two boats in occasional concert with helicopter gunships. These missions were: search of waterborne passengers and cargoes with detention and seizure if warranted, gunfire support for U.S. and South Vietnamese troops, blockade, direction of air-strikes and artillery against concentrated or fortified positions, insertion and retrieval of Navy SEALS and other commandoes, rescue of downed pilots, and evacuation of wounded. I conducted these patrols under the direction of the River Section Commanding Officer, assuming tactical control of two boats. I filed written reports detailing the events of the day, or night, at the end of every patrol.

amplifications:

6A. On 03-07-68 my patrol, PBR's 15 and 18 of River Section 534, was attacked with automatic weapon and rocket fire in the Ben Tre Canal. A. B-40 rocket hit atop the after .50-caliber machine gun mount of lead boat 15, killing the after gunner and wounding myself, the boat captain, and a seaman. The boats managed to get into the Ham Luong River where a web-belt tourniquet was applied to my left leg. A helicopter arrived in perhaps forty-five minutes, and I was taken to the Army's Dong Tam base for surgery.

After a month at Army hospitals in Vung Tau and Saigon, I was sent to the Army's 249th General Hospital near Tokyo where I remained about six weeks. I was next sent to the Naval Aerospace Medical Center at Pennsacola for a recuperative period until January 22, 1969, when I was transferred to the Bethesda Naval Hospital for the construction of a new eardrum. On April 11 I was released to the Washington Naval Station, and there discharged from active duty on August 8, 1969.

Since then I have, as recorded in medical record, been an outpatient 6-8 times for support stocking and UNA Boot treatment and an inpatient 2-3 times for bedrest and evaluation at naval hospitals at Bethesda, Oakland, and San Diego, and military hospitals at San Francisco and Honolulu.

7. My first contact with the Veterans Administration was on April 7, 1969, when a representative came round at Bethesda and gave me an application for disability compensation. On that basis I was awarded a summary 50% disability on September 10, 1969.

I was first physically examined for disability evaluation at the VARO in Honolulu in 1972. I was then declared 70% disabled and unemployable, and on that reckoning began receiving 100% compensation from August 17, 1972. I remained in this category until November 1, 1978 – I had begun working at the University of Hawaii in June of that year. I worked as noted in 14 in several intervals until March, 1980, receiving 70% compensation for the period. At the end of this work period I was again evaluated and pronounced unemployable: I have received 100% compensation since March 12, 1980.

VA vocational-rehabilitation:
In January, 1974, I began a nine-week pre-college Special Veterans Education Program at Chaminade College in Honolulu (I had acquired GED high school and one-year college equivalencies in the Navy in 1955 and 1962). Following this I commenced undergraduate study at the University of Hawaii, transferred to the College of William and Mary in 1975, and there attained a BA degree (Government major, Philosophy minor) in August, 1977.

I started postgraduate study in Public Administration at Golden Gate University at Travis AFB, California in the Fall of 1977, and gained the degree of Master of Arts from Central Michigan University at Hickam AFB, Hawaii in the Summer of 1979.

14. The U.S. Navy rate of pay is that for my last full year of active service, 1968.

The circled [here underlined] approximations are substantially accurate. The "university administration" position was at the University of Hawaii Personnel Office, and the "city/federal housing survey" was one conducted by Honolulu/HUD.

There was insufficient space to list about $1,200 income from about three months total temporary jobs taken in Las Vegas, Reno, San Francisco, and Honolulu during 1970-73.

While I have not worked one day since March, 1980, it is plain that I do not meet the twenty quarters of earned income requirement for 1970-80. I ask your contemplation of the fact that for a three-year period during 1974-77 I was a full-time student in the VA vocational-rehabilitation program – this subsequent to my initial application of September 13, 1972, when I did meet the requirement.

Thank you.

I certify that the above statements in this Attachment are true.

/s/ Robert M. Wenzel August 1, 1988

Note: There is an apparent incongruity in holding temporary jobs in 1972-3, while receiving 100% compensation based on unemployability from August, 1972. The VA allowed, indeed encouraged, such attempts to work. Unemployability as a compensation consideration was ruled out when employability, on a sustained basis, was demonstrated.

Narrative

The essential chronology:

5/67: Reported for duty, as a thirty-year-old Navy First Class Radarman (E-6 – the rating is now called "Operations Specialist") with thirteen years service, to the River Patrol Force in the Mekong Delta of Vietnam. I was first a river patrol boat captain and later a patrol officer.

3/68: Injured by enemy B-40 (aka RPG-2, and "tank-buster") rocket, sustaining a shearing of outer side facet of upper left leg, a broken femur, a severed artery, a ruptured eardrum, and embedded shrapnel from knee to cheek. There has ever since been bone, muscle, tendon, artery, vein, and nerve involvement, with effects described herein and in, either at face or by medical inference or implication, my medical record.

4/69: Released from Bethesda Naval Hospital, the last of four Army and two Navy hospitals. I received Social Security disability benefits for the last seven months of this hospitalization; I have not since received them.

8/69: Released from active duty, at Washington Naval Station, with a Navy temporary disability rating of 60%.

9/69: Assigned a Veterans Administration tentative (based on hospital records) disability rating of 50%.

8/71: Assigned a Navy permanent disability rating of 50%. It is permanent; only the VA will adjust its rating for a changed condition.

8/72: Hospitalized for five days at Tripler Army Medical Center in Honolulu for (from the narrative thereof) "impending venous ulcer of the left lower extremity."

9/72: Filed first claim, since thirteen-month hospitalization, with the Social Security Administration in Honolulu for disability benefits. In the three years since Navy discharge, I had worked about seven months, two in temporary jobs of mostly light manual labor, and five as a ski-lodge security guard. My claim was denied, leading to, a year and a half later, a Hearing by the SSA.

11/72: Requested and received first VA evaluation.

6/73: Assigned adjusted VA rating, retroactive to 8/72: "We have determined that your disabilities render you unemployable and have assigned a 100% evaluation based on your unemployability."

1/74: Started VA vocational-rehabilitation program with enrollment in a nine-week Special Veterans Program at Chaminade College in Honolulu. In the interim since 9/72 I had worked a collective month and a half at temporary jobs. The VA encouraged attempts to work – unemployability as a compensation consideration was removed upon a demonstration of substantive (sustainable) employability.

3/74: Received Hearing by SSA Administrative Law Judge William H. Yim.

4/74: Commenced undergraduate study at the University of Hawaii at Manoa.

5/74: Received Hearing Decision. My claim was denied.

10/74: Received Appeals Council's upholding of Decision. I did not, within the allotted sixty days, initiate a court action. I did not because I accepted as judicial a right extrajudicial pronouncement by the judge (to be presented in the forthcoming general beholdment of his document), this and all else unreservedly affirmed by the Appeals Council. I did not, for this reason, have any further communication with the SSA until 8/88.

8/75: Transferred to the College of William and Mary in Williamsburg; I received, in '77, a BA in Government.

11/77: Commenced postgraduate study at Golden Gate University at Travis Air Force Base in Fairfield. I finished the VA program at Central Michigan University at Hickam AFB in Honolulu; I received, in '79, an MA in Public Administration.

6/78: Began work, Comprehensive Employment Training Administration-sponsored, as a Personnel Management Specialist I, at the personnel office of the University of Hawaii. From the outset there were periods in which I could not, because of peremptory pain, do my job, stay on it, or show up for it. After five months of increasingly frequent such periods, I told Personnel Officer David Luke what he did not need to be told, that I could not give him an honest, or other, eight hours. I resigned.

Why was I unable to do a desk job, when I was able to go to college? My college day was five hours, my college night (at the base extensions) was three hours. More importantly, when I could not pay attention in a class, I could turn on a tape recorder. When I could not stay in a class, or show up for it, I could get a tape or notes from others. Crucially, my primary workplace was my house. I could select those hours in which I was best able to work, and I could maintain, most of the time, a beneficial posture.

I attended classes when possible, when not I went home – or stayed there. I was as likely to be at work at the hour of 4 a.m. as any other, reading the books or notes, running the tapes, pounding the typewriter. Most of all except the pounding was performed in that most advantageous of postures for one with an ulcer-prone leg, the horizontal with the impaired member elevated. It is a posture that will not, in a number of workplaces, quite do.

2/79: Tested for Federal civil service. I was rated eligible for GS-9 as Public Information Specialist or Personnel Management Specialist, with one-year periods of consideration from 12/79 and 1/80. It was not the best of times for the civil-service aspirant. When I tested there already was a partial job freeze, and on 3/31/80 the President announced that there would be at least 20,000 fewer Federal civilian employees by the end of fiscal year 1980. (CETA preserved its status quo.) I did not seek further periods of consideration.

3/79: Began work, again under the aegis of CETA, as a phone contact in the public information office of Honolulu City Hall, for several weeks until the start of a Honolulu/Housing and Urban Development housing survey, which I worked as a phone surveyor to its three-month completion.

2/80: Began work as a census-taker for the 1980 Census, which I worked to its (my part's) six-week completion.

Why did I, after the personnel office experience, make further motions? My second child was born in 3/79; my wife could not work for a time; our income, if I did not work, of 100% VA disability was just about enough for the house rent. I have not worked a day since 3/80.

8/86: Settled in Las Vegas, my wife having beforehand obtained employment here.

7/88: Treated by Dr. Anthony Moran at Nellis AFB and later by Vascular Surgeon Byron Gwinn II in the city for an ulcerous leg.

8/1/88: Filed second claim with the SSA for disability benefits; submitted Disability Report.

8/17/88: Received an SSA letter: "We have determined that you are not entitled to disability benefits. The reason you are not entitled is that you do not meet the earnings requirement of the law at the time you state you became disabled. . . . "

5/90: Treated by Dr. Wyn Rhys Jones at the Las Vegas VA Clinic for an ulcerous leg.

5/92: Made first appeal to the SSA for the reopening of the Hearing Decision, the one "carefully considered" "correct" by an Appeals Council; provided this (the substantial same) narrative. What is not to be denied has a way of becoming, when there is not much accountability, what is not to be seen. Seeing nothing and hearing nothing and speaking nothing: the introduction of aspect whatsoever of the Hearing Decision and its sustainment will not be allowed; indeed, the very existence of this narrative will not be acknowledged.

6/93: Treated by Dr. William Vandervort at the clinic for an ulcerous leg, a "venous stasis ulcer."

My evaluations and treatments from 1970 to '88, only two related here, are related in Disability Report. All since '90 have been by the VA; it is with regularity that I have been seen by its doctors. They include two vascular surgeons at the Loma Linda (Calif.) VA Hospital and one visiting here from the Grand Junction (Colo.) VA Hospital.

Social Security disability beneficiaries who attempt to work continue to receive full benefits during a trial work period of nine months. My longest continuous work period has been five months. I have worked a total year and a half in twenty-seven years. I have received a total seven months of Social Security disability benefits in twenty-seven years.

On one occasion, all the while, have I been seen by one of authority in the SSA. The occasion was the 3/74 Hearing, with the one of authority being SSA Administrative Law Judge William H. Yim.

HEARING DECISION

Administrative Law Judge William H. Yim
Honolulu: May 21, 1974

P. 1, sent. 2: "The Claimant has represented that . . . [he had been a] master of arms in charge of two river patrol boats, when he was wounded by an enemy rocket in 1968. . . . "

I represented that I had been a "master at arms" aboard the Seventh Fleet Flagship, the Light Cruiser *Providence,* during 1962-66; that I had been a "patrol officer" in charge of two river patrol boats when I was wounded in 1968.

The judge, at the top of a document bound to hold lasting import for its subject, cannot come up with the right title (proceeds to mangle, for good measure, the wrong one) of the subject on the inceptive event. The question is not whether this is, in isolation, of any moment. The question: is this indication of carefulness?

P. 4, para. 5:

> The Claimant further testified that while he had been given a 60% disability rating on his discharge from the Navy in 1971 and had thereafter been awarded a 50% disability rating by the Veterans Administration, he had applied for a reevaluation of his rating by the Veterans Administration, had been examined at its Honolulu Clinic in November of 1972, had his disability rating increased to 70% and had been allowed an additional 30% for "deemed unemployability", making for a 100% disability, which began paying him $495 a month in veteran's disability benefits in April of 1973.

The three errors in this passage (see, please, pages 1 and 2 of chronology), like the one of title, do not reflect my testimony, are solely those of the author. But the reason it is reproduced is that it is the one sentence containing this remarkable author's one mention of my VA rating.

The SSA is not obligated to accept that agency's, or any other's, determinance. At the same time, as shown in *Social Security Claims and Procedures,* by Harvey L. McCormick, Third Ed., 1983, a number of courts have held that a VA rating must be given serious contemplation. One such:

> While Veterans Administration rating of disability benefits claimant as one hundred per cent unemployable was not binding on Secretary in determining rights to benefits under this section, it was evidence that should have been considered and was entitled to great weight. (Vol. 2, P. 192; a 1972 case is cited.)

A more recent ruling is more emphatic:

> In the absence of controverting medical evidence or opinion, the Secretary could not disregard Veterans Administration medical evidence showing that the claimant was suffering from disabling impairments. *(McCormick,* Fourth Ed., 1991: Vol. 2, p. 209; a 1977 case is cited. And attached, to this stirring pronouncement, is the "But see. . . . ")

What consideration, what weight (to refer only to the guidelines already established by the time of my 1974 Hearing, is given a VA rating that is in its one mention decked out as " 'deemed unemployability,' " that is on that occasion presented as only my testimony – a VA rating that is neither verified nor addressed? Is this indication of impartiality?

P. 5, para. 1:

> The Claimant also testified that in sitting through the five hours a day, five days a week schooling he was undergoing, he would prop his left leg up on another chair, extending it parallel to the floor, to keep down the flash cramps and pains in the leg and swelling in the foot which would come on any time his leg was below his torso – he was sitting, standing or walking – continuously for as long as 12 to 16 hours. He explained that propping his leg 45° above a horizontal plane by leaning back in a chair as he did in his apartment made for greater comfort but was not practical in a classroom. He claimed that the "disesthesia [sic] sensations" in the leg had increased recently and that the dermatitis on the ankle, which was caused by poor circulation resulting from loss of a part of an artery and other blood vessels, had doubled in size over the past two years and that bloody fluids would collect in the ankle area, discolor it and occasionally drain through an opening in the skin. [What the judge calls an "opening in the skin," for reason that will be established, is an ulcer.]

These sentences are sufficiently tortuous (notwithstanding the spottings of "whether" before "he was sitting" in the first, and "as" before "practical" in the second) that it is not entirely clear what point the judge is after. One possibility is that I did not, by my own testimony of course, get "the flash cramps and pains" until my leg had been below my torso "continuously for as long as 12 to 16 hours." Indeed.

My condition of pain issues from five medical conditions. Each one of four implies pain, the remaining one infers it. Pain set in upon the removal of morphine at Pensacola Naval Hospital. It has not since withdrawn.

The Bethesda Narrative records my conditions of ankylosis, hypesthesia, dysesthesia, paresthesia, and osteoporosis, the last three associated, in medical literature, with pain. I have not, since Pensacola, had one awake minute without a leg here cold, there not, here numb, there quite otherwise. I have not since had one awake minute without, in that leg, either a grinding ache or a throbbing pain or both. There is, from time to time, more.

The Bethesda Narrative does not record, only foretells, what did not fully manifest itself until after I had left the hospital. My condition of chronic venous insufficiency, one sign being the recurrent swelling, to ulceration, of the lower leg and foot, was not long in coming, and becoming my predominant condition. The Pensacola and Bethesda narratives record the forewarning sign, the swelling that markedly increased after leaving Bethesda's bed, the swelling that produced an ulceration before the year was out – the swelling that at once implies its own pain and an intensification of all others.

The Pensacola and Bethesda narratives record my condition of shrapnel retention. Whether or not this substantial amount of embedded metal fragments, a portion unstable, has an effect is subjective, a matter of inference – none, some, or all. For this record: I have not, since Pensacola, had very many days without randomly arriving electric-jolt-like pangs and cramps. They are severe.

How much of this so much as receives mention by the judge? "Flash cramps and pains" are mentioned once, this as only my testimony. " 'Disesthesia sensations' " are mentioned once, this again as only my testimony. "Some discomfort" is mentioned once, this as the judge's allowance. The judge will not use the word "pain"; there are no further considerations – the signal disallowance being what is *implied* in both the Tripler Army Hospital Narrative "in evidence" (next page and a number thereafter) and the judge's *own* (however curtailed) *summary*. The judge will not be bothered to address so much of my testimony as is "presented" – the condition of pain has been dealt with. The appropriate question has before been raised.

P. 5, para. 1:

> But he acknowledged that aside from salves and powders for the dermatitis, he was taking no medications and that he was not seeing any doctors for the condition on a regular basis; that he could drive; and that he had made trips to California in October of 1972 and November of 1973 since coming to Hawaii.

1. I did not apply (antibiotic) salve to "the dermatitis"; I applied it to an ulcer. I sprinkled (talcum) powder on the foot and leg before putting on a support-stocking.

2. I was "taking no medications" because there were none to take. No medication for a taking (an analgesic or anticoagulant agent) has been, since Bethesda, prescribed for me.

3. I was not regularly "seeing any doctors" because there was nothing doctors could regularly do. Any healing that would occur had already done so – nor did I have a disease. I irregularly saw doctors for damage control of irreversible injuries.

4. I "could drive," and I had made two "trips to California." While the point the judge is after is clear enough, his reasoning in his selection of supporting evidence is not quite so. Disability status does not turn on the ability, or the inability, to drive and to take two trips to California.

Here, my own (interim) summary. Does this passage indicate medical competency? Legal competency?

P. 5, para. 2: "Claimant said that he had 'no affinity for technical work', even though he had been a radarman in the Navy; that civilian jobs similar to that work were scarce. . . . "

Another, in a hurry, irrelevancy – disability status does not turn on the affinity, or the nonaffinity, for technical work. There is yet here, after a fashion, relevancy: the judge is not quite so careless as not to provide a measure of claimant credibility. Because he has made a reach for ridicule here, it must be answered.

"Technical work": I told the judge that when I entered the Navy in 1954 the Radarman only operated, did not repair, his equipment, that repairs were then made by the Electronic Technician. Toward the end of that decade there came a time when the new Radarman began receiving technical training. As for the Old Hands, some made the transition and some did not. I did not.

How many civilian jobs were similar to that of the nontechnical Radarman can be surmised upon a reading of my job description contained in my 1988 Disability Report. The surmising will be confirmed by Department of Labor manuals that then made such correlations. The appropriate question has before been raised.

P. 5, para. 3:

> The only medical reports in evidence relating to the Claimant's condition since April of 1972 consisted of a Tripler Hospital narrative summary on his August 1972 five day stay there and the clinical record on his November 1972 Veterans Administration 1972 evaluation.

Since April of 1972? And what about since March of 1968? Two by no means comprehensive records were the extent of the judge's medical evidence. My complete medical record then lay on the shelf at Tripler, less than ten miles from the Federal Building in downtown Honolulu. From Tripler's shelf its narrative was brought forth – while the Pensacola and Bethesda narratives and the Navy Physical Evaluation Board record of proceedings were not. Was fundamental medical evidence too bothersome for the judge who, in the end, in the presentation of incomplete medical evidence, has to resort to deceit?

> In a proceeding wherein Social Security disability claimant is not represented by counsel, obligation of administrative law judge to fully develop the record may require that administrative law judge advise claimant that vital data is missing or order a physical examination by a Social Security Administration doctor. (*McCormick*, Third Ed., Vol. 2, p. 168; a 1977 case is cited, the opinion therefrom being a restatement

> of one from a 1974 case, cited on p. 94, same book.)

P. 6, para. 3:

> Although the evidence indicates that the Claimant does experience some discomfort in his left leg on being active, it also indicates that he is much too able bodied and minded not to be up and about like a normal person. He is 6'2", in height and weighs the 190 to 200 pounds that he weighed before he was wounded.

The judge who will not allow more than "some discomfort" is the judge who will not (perhaps cannot) sort out antibiotic salve and talcum powder, who confuses injury with disease, whose knowledge of dysesthesia (and, it might be inferred, associated conditions) is somewhat indicated when he cannot, in the moment of truth, spell it.

The judge's finding is that I was able to be "up and about like a normal person" – this under "*The Rationale.*" Is this, in light of the findings of the Navy and the VA, not to mention what the judge himself will allow in his next-page summation, indication of rationality?

The judge, in another after-a-point and altogether impressive flourish of carefulness, observes that I had not sustained height or weight change. He may have forgotten that injuries such as mine do not necessarily, or even usually, cause height or weight change.

P. 7, *"The Findings and Conclusions":*

First, the law. Cited by the judge (p. 2, para. 5):

> The portion of section 223(d)(3) which defines a "physical or mental impairment" as "an

> impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

The immediately following sentence, a portion not cited by the judge: "A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms."

How many signs, symptoms, and findings might be needed? More for the one than will be allowed by the same.

P. 7, 4.:

> Since the alleged disability onset date, the Claimant has had the following significant medically determinable impairments: shrapnel fragments and artery and nerve involvement in his left leg and dermatitis with an occasional draining skin lesion on his left ankle as residuals of battle wounds sustained while serving in the Navy in the Vietnam War.

This studiedly short summation is not, less studiedly, short on confusion approaching incoherence. "Shrapnel fragments and artery and nerve involvement in his left leg" are significant impairments? If so, why? "Dermatitis with an occasional draining skin lesion on his left ankle" are significant impairments? If so, why?

They are so. The reason they are is that there is, in the first instance, what "could be reasonably expected" (the language of the SSA, next page); there is, in the second, what is "established by medical evidence" (SSA, last page). There is what the judge will not allow, will not consider – will not so much as use the very word. There is pain.

"It is well established," writes McCormick, "that pain, standing alone, can be sufficiently severe, prolonged and intractable to constitute a 'disability' within the meaning of the Social Security Act." (Third Ed., Vol. 2, p. 278; four cases are cited, three of which were of at least seven years standing at the time of my Hearing.)

What the judge calls a "draining skin lesion," for reason that will be well established, is an ulcer. Its occurrence, all else aside, implies that there has been, in the preceeding weeks or months, swelling that continued until the skin burst. The condition of chronic venous insufficiency, on its own account, implies pain.

All else recalled: three permanent pain-associated conditions were recorded at Bethesda. It is not other than medical implication that the three are at once made worse as well as added to when another is in the swelling phase of its swelling/bursting/closing cycle, that there is in those weeks or months substantially intensified pain.

SSA: 20 CFR Ch. III (4/1/91 Ed.), § 404.1529:

> We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, unless medical signs

> or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.

§ § §

McCormick: Third Ed., Vol. 2, p. 189:

> Notwithstanding 20 CFR [etc.], the courts in one form or another have held that clinical demonstration is not necessary to establish disability. These decisions have specifically held: that unmeasured pain may be disabling under the Social Security Act, that the term "medically determinable" as used in the Act does not mean that opinions or conclusions must be supported by objective clinical findings, and that subjective ailments may be disabling. . . . (1967 and 1968 cases are cited.)

McCormick but foreshadows: he has eleven pages (278-289, same book) of case citings under "Pain and Discomfort as Disabling." Two reproductions, with your indulgence, from the collection:

> The claimant was 60 years old, had a partial college education, and had worked in the retail sales field. He suffered from "severe migraine headaches" which hurt all the time to some extent. The Administrative Law Judge, while finding that the claimant's headaches were "partially disabling," held that the claimant was not entitled to disability benefits. The denial was based, in part, on the fact that the claimant drove a car, did handiwork around the house, and had been gainfully employed for thirty years, during which time he complained of headaches.

However, the court concluded that the severity of the headaches precluded the claimant from functioning "in a structured work situation." The medical evidence and testimony supported the claimant's complaints even though it was "hard to find any objective signs" of the headaches. No medication worked consistently to relieve the pain. Further, the fact that the claimant drove and did handiwork did not establish that he could perform substantial gainful activity. The court stated that the Administrative Law Judge's decision had ignored evidence concerning the work problems the claimant's headaches had caused him . . .

Thus, despite the largely subjective nature of the claimant's complaints of severe pain from headaches, the court held that the claimant was entitled to disability benefits.

(P. 282; *Yawitz,* etc.: 1974.)

* * *

The claimant, a 48-year-old laborer with an eighth grade education, said he had suffered a car accident resulting in severe headaches, neck pain, and skin problems. The claimant testified to the severity of his pain and medical reports were consistent with his complaints . . . The Administrative Law Judge denied benefits because the claimant's disability was not of sufficient severity. The court disagreed. . . . In granting benefits to the claimant, the court concluded:

> Since there is no factual basis in the record upon which the Administrative Law Judge could reject Lund's testimony, his subjective complaints, which may serve as the basis of

> a disability award, stand unrebutted . . . Under these circumstances, the rejection by the hearing examiner of the evidence of disabling headaches was arbitrary and contrary to substantial evidence in the record. While credibility determinations are for the Secretary, there should be found in the record some basis for disbelieving such critical testimony. We find none here.

(PP. 281, 282; Lund, etc.: 1975.)

At the time of my Hearing, every aspect except the one subjective of my "medical condition" (SSA, back two pages) was a matter of medical record, had been so for four years. That medical record shows that, after some increases in leg strength and knee and ankle flexibility, there has been no improvement in any other aspect of my medical condition – there has been only more of the same or worsening thereof. Ulceration, as prime example of the last, did not begin at the hospitals; it began after I, if not quite like a normal person, had gotten up and about.

Toward a contemplation of the subjective, some objective particulars: a leg sheared (in degree specified in Bethesda Narrative, p. 4), with loss of and damage to, among other components, artery, vein, and nerve; a leg periodically swollen, with a foot constantly so (ulceration only reduces, does not eliminate, foot swelling); a leg riddled with shrapnel (in unremoved amount described in Bethesda Narrative, p. 3), some of which (as tracked by the x-ray machines) is not stable.

The subjective: Could it be "reasonably expected" (SSA) that this amount of metal fragments, some portion unstable, concentrated in a leg with lost and damaged nerve and with a disposition to swell being parts of its own condition, would contrive to produce randomly arriving electric-jolt-like pangs and cramps?

Thus, the first count. The second:

§ 404.1520: "If you have an impairment which meets the duration requirement and is listed in Appendix 1 . . . , or is equal to a listed impairment, we will find you disabled without considering your age, education, and work experience."

Appendix 1 . . . :

> 4.12 *Chronic Venous Insufficiency* of the lower extremity with incompetency or obstruction of the deep venous return, associated with superficial varicosities, extensive brawny edema, stasis dermatitis, and recurrent or persistent ulceration which has not healed following at least 3 months of prescribed medical or surgical therapy.

At the time of my Hearing, all of the associated signs were a matter of medical record. Three were plain to see.

The only sign not then immediately plain was "extensive brawny edema." The edema (an abnormal accumulation of fluid resulting in swelling) was not then as pronounced as before because I had by then experienced the ulceration cycles for four years. With succeeding discharges, the ulcerating area (in accordance with medical inference) had become larger, had become more conducive to them – had taken to discharging more frequently, upon less swelling. One indication of how extensive brawny the edema would be in the year or so before more frequent ulcerations: "The left ankle is much larger than the right, and there is pitting edema about the ankle." (Navy PEB record, p. 6. I was then at the Washington Naval Station, up and about, but still on a cane.)

Here, the establishing of the listed impairment of chronic venous insufficiency. There are, after all, "medical reports" (if only two spare ones) "in evidence" (if only for form's sake) here.

P. 5, para. 4: There is the extract from the Tripler Narrative, in which I had been " . . . admitted for impending venous ulcer of the left lower extremity." It continues:

> . . . [T]here is an area of hyper-pigmentation healing skin indicative of stasis dermatitis, approximately 5 x 5 cm in diameter. There is some superficial erosion. There is a trace of pedal edema of the left side. There are extensive superficial varicosities of both lower extremities.

P. 7, 4. (summary): There are, as "significant medically determinable impairments: shrapnel fragments and artery and nerve involvement in his left leg and dermatitis with an occasional draining skin lesion on his left ankle. . . . "

There is p. 7, 4. and there is p. 4, para. 3: "The evidence clearly showed . . . multiple shell fragment wounds to the left side of his face, his left arm, his chest, and his left leg with artery, vein and nerve involvement. . . . " This is the totality – "some discomfort in his left leg" aside – of the judge's description of my medical condition. All else is either couched as my testimony or is taken from the reports.

How does the judge specifically (if not altogether adeptly) deal with what was plain to see, what was a matter of medical record, what he establishes (however unwittingly) in his own record? By resorting to deceit. By this there is the establishing of a gross abuse of discretion.

1. The judge will nowhere himself use the term "chronic venous insufficiency"; he will nowhere himself use any word in the term; he will nowhere himself use an equivalent term. He will deny, in his "reproduction" of a segment of a medical record, even the reproduction of an equivalent term.

2. The judge will deny one of *his own words*: the summary's "artery and nerve involvement" has had deleted a certain word from p. 4's "artery, vein and nerve involvement."

3. The summary's "dermatitis" has had deleted, as it has in every rendering, a certain prefix – the one that means a stoppage of the flow of bodily fluid, as of blood. The judge will reproduce "stasis dermatitis" from each of his two pieces of medical evidence; he will nowhere himself use the term.

4. The judge will reproduce "venous ulcer" from one of his pieces; he will nowhere himself use the term, or either word. He will use the three-word "draining skin lesion"; he will use the four-word "opening in the skin"; he will nowhere himself use the one word, "ulcer."

5. The summary's "occasional draining skin lesion," as any number of people in the Federal Building could have told the judge, is not the intended distancing from,

it is but the synonymizing of, 20 CFR's "recurrent or persistent ulceration."

6. The judge "reproduces" a segment in the VA record containing the findings of eleven deficiencies or abnormal conditions. Only ten, however, will be found in the Judge's record. The condition denied a reproduction? "Vascular insufficiency."

The judge who will, somewhat carelessly, establish three ("stasis dermatitis" and "superficial varicosities" in his reproduction of medical evidence, and "recurrent or persistent ulceration" in his production of a synonymy) of 20 CFR's four signs associated with the listed impairment of chronic venous insufficiency, is the judge who will not, ever so carefully, mention, or tolerate any other mentioning of, the condition these signs imply. The judge establishes, by his own hand, among other considerations, a gross abuse of discretion.

Thus, the second count. I met Social Security, on both the conditions of pain and chronic vascular insufficiency, on its own terms – I did not stand in need of certain refinements handed down by the courts.

I have met these terms from the day of my departure from Bethesda to this day. What is now a matter of medical record could have been foreseen in 1969, had I been seen by an SSA doctor, or had the SSA but obtained and considered the medical evidence, as a matter of medical implication: my condition was one of irreversibility.

I have not, to this day, been seen by an SSA doctor. The *fundamental* medical evidence, the Pensacola and Bethesda narratives and the Navy PEB record, was not, at the time of my Hearing – almost certainly has never been – in my SSA record.

The SSA's termination of my disability status was based solely on the circumstance that I was no longer hospitalized, was arbitrary. The denial of a reinstatement was the process of a see-nothing-tolerate-nothing SSA judge – of a malfeasant, among other considerations, SSA judge.

A round of reiteration. Five of my permanent conditions, three associated with pain, are recorded in the Bethesda Narrative. One, one time, only as my testimony, only in passing, and then misspelled, receives mention in the judge's record. The judge will not use the word "pain"; my "flash cramps and pains" testimony is its only appearance in his record.

My seventh (shrapnel retention being the sixth) and soon to the fore condition, the one foretold in the Bethesda Narrative, is recorded in what I do not have, the Tripler Narrative (implicitly if not explicitly – for no other cause was I a Tripler patient). It is recorded in what I do have, the VA record. My predominant condition does not receive mention by the judge; VA-record mention is edited out in that record's "reproduction" in the Hearing Decision.

And a round with the two four-years-after-the-fact-and-then-fragmentary "medical reports" (the language of the judge) that were obtained and "considered" and "presented" in the Hearing Decision. The Tripler Narrative could not be expected to be comprehensive; it is an account of a five-day stay. The VA record could be, but it is an account by a less than thorough orthopedic examiner.

It might be supposed, reading the VA record, that hypesthesia was in 1972 the sole survivor of the five conditions recorded at Bethesda – it being the only one to receive mention. Is it, however and for example, possible to suppose that ankylosis (an abnormal adhesion of the bones of a joint) had then taken a turn for the better? If it is, then it might be supposed that my left leg, as recorded at Bethesda, was no longer "1 cm shorter" and "4cms smaller" (at mid-thigh) than the right. The Tripler Narrative mentions "extensive superficial varicosities of both lower extremities"; there is no mention, three months later, of so much as one in the VA record.

This is the sum and substance. This is the only medical evidence, almost certainly, with the only "interpretation" thereof being Judge Yim's, that has ever been in my SSA record. *This* is what has been lying, for some time now, in that record.

Here, the pivotal lie. The judge, in case his recurrent flouting of law might not alone carry the day, wraps up with a fabrication of law. The preemptive stroke is delivered, with brazenness of an order perhaps anticipated by the word's creator – or perhaps not, as concluding "rationale."

P. 6, para. 5:

> The Claimant appears well-advised in his plans to enter college to take journalism. He seems certain for success, particularly in that field. But if he can go to college, he can do a desk job. Even though that would be a waste, it is a

> measure which indicates his non-disability for Social Security purposes.

It must not have occurred to the judge, when writing his first two sentences, that his now convenient reach for flattery did not square with his then – one page earlier – convenient reach for ridicule. There is, in his last two, something distinctly beyond conflicting convenances.

There is inhering, in the first, of the last, in Judge Yimls brand of logic, a certain fallacy – one that does not need belabor. I have related why I have been able to go to college but have not been able to do a desk job. Why have I, unlike a number of others in the category, been denied disability status? All, fairly said, turns here: because fallacy becomes, in the second, measure; becomes, effectively, law – albeit fabricated law expressly contravening unfabricated law.

§ 404.1572: "Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity."

Generally indeed: since 1968, six years before my Hearing, all state voc-rehab agencies have been receiving SSA funds for training programs. That training has included, from two-year to postgraduate, college programs. (The judge may not have come across such readings as *An Introduction to the Vocational Rehabilitation Process,* VRA/HEW: 1967, and "Financing of Disability Beneficiary Rehabilitation" in the *Social Security Bulletin:* April, 1969.)

A disabled, per SSA, man attending college under a state voc-rehab program will throughout receive disability benefits. He will thereafter continue to receive them until he has completed a nine-month trial work period. If he cannot work for such period, or says that he cannot (and the SSA cannot show otherwise), he will continue, indefinitely, to receive them. Should he, moreover, for any reason seen as other than good by the SSA, not accept or not continue to completion his college program, his benefits are, on the instant, terminated.

The disability universe according to Judge William H. Yim: a disabled, per VA, man attending college under the VA voc-rehab program has by that very fact provided token that "he can do a desk job." This, perforce, "is a measure which indicates his non-disability for Social Security purposes."

There are, concerning the judge, no further questions. There is, concerning me, this appropriate question: why did I accept the judge's pronouncement without question?

The answer is: because of who and what I was. I was a high school drop-out with fourteen years of Navy school. Such a man, in the face of officialdom, is not very often a questioning man, will not very often be accompanied by a questioning lawyer – he is a compliant man. He will not, being "very intelligent and knowledgeable" (on the judge's word), need very much time with the Hearing Decision to find a certain "measure," and to regard it as not other than a preceptive disqualification. He will, credulously enough, make his in-house appeal, will then, as a matter of form, hunker down; will await such time as "they" see fit to do him right and overrule the "measure."

That failing, the Hearing Decision "carefully considered" "correct" by an Appeals Council, he will stop. He cannot imagine, let alone see, that a judge in practice of administration of law had at last made his point (perhaps his day – certainly my years) by seizing on a "measure" that had no basis in law – not to mention one in contravention of law. (I) then accepted it as based in law; I accepted its consequence of nondisabled, per SSA, status – I *was*, if it killed me as consequence, going to college.

By the time I had come round to keeping an eye on my erstwhile blind spot, the sixty days allowed in 20 CFR, in general, for the initiation of court action had long passed. I then managed to suppose, being even longer from finding out that this condition *is* general, is overridden by certain circumstance made plain in 20 CFR, and elsewhere, that all was lost because of my nonfulfillment of condition. I had been, on the occasion, a noncompliant man.

I supposed it for quite some time, until about the time a spate of provoking tidings began appearing about some of the disabled, about the SSA's denial of, sometimes to their deaths, their disabilities. To have read "District and circuit court rulings abound with references to Social Security systematically denying disability benefits to people entitled to them" (AP article appearing July 21, 1990) is shortly to have more than cursorily read – to have done so, because of beginning acceptance and ensuing supposition, for the first time – the SSA's, only to say

Judge Yim's, denial of mine. It is then to have read what speaks to this denial.

> Where hearing on application for disability insurance benefits was dominated by administrative law judge whose prejudgment determination that applicant was not entitled to benefits was manifest in procedures, interrogation, and presentation of witnesses, applicant was effectively denied procedural due process, and such denial alone warranted reversal of decision of Secretary of Health, Education and Welfare to deny disability benefits. (McCormick, Third Ed., Vol. 2, p. 109; Fourth Ed., Vol. 2, p. 81; a 1974 case is cited.)

The appeal on the grounds of a denial of procedural due process is one routinely abused. Here? The judge's procedural-process seven pages, taken with these and those of the medical records – for that matter, taken at face, speak for themselves. It is not abused here.

The Hearing Decision is a document flawed in almost every imaginable way, one that altogether would embarrass a kangaroo court. It is clear evidence of its author's inaptitude for and gross abuse of discretion.

What is not in the Hearing Decision:

Any medical evidence from, or from the four years thereafter, my thirteen-month hospitalization – or any mention of it.

Any medical evidence that receives addressment whatsoever.

Certain medical evidence that was seen (obviously enough) as sufficiently inexpedient to be in it.

What is the entirety of the judge's mention of my matter-of-record conditions of ankylosis, hypesthesia, dysesthesia, paresthesia, osteoporosis, shrapnel retention, and chronic venous insufficiency, and my medically-implied one of pain:

"Shrapnel fragments."

What is in the Hearing Decision (these pages aside: taken now with only the facts in the case and the "medical reports in evidence"; taken then with even this aside):

Self-evidence, in the erroneous rendering of certain matter-of-record facts, of carelessness approaching slovenliness.

Self-evidence of irrelevancy here and irrationality there, of, in serious – or is it the other way round – measure, medical and legal incompetency all over.

Self-evidence, in the evading, altering, and synonymizing of inexpedient words and terms, in the expunging of one such term, and in the contriving of a patently illicit "measure," of partiality reaching malfeasance.

Self-evidence, in the unwitting reproduction of medical evidence and the witting production of a certain synonymy, of the establishment of the listed impairment of chronic venous insufficiency.

Self-evidence, in the denial of my disability, in the handing down of an *openly intentional* error on the face of the evidence, of as gross an abuse of discretion as is possible.

Self-evidence, at last, of the standing on its very head of due process of law.

The judge's credibility addressed, a turn with the claimant's. Some time ago the SSA, in the person of its judge, said that I could work. If the judge was right (was, as it were, false in just about all, but not false in one), then I was and have since been a malingerer, a word that translates handily into Navalese as "slacker."

Toward a contemplation, a couple of subjective measures. What is the likelihood of a slacker letting three years pass after the termination of his disability status before applying for its reinstatement? Of a slacker letting three years pass before asking for a VA evaluation?

The primary objective measure, both for the SSA and the courts, is prior circumstance job performance. The matter of whether I was a slacker is spoken to by the enclosed records from my last years on the job.

In fine: considerably more than three years have passed. I am now, and have been since March of 1968, by the letter of the law, disabled. I am now, and have been since May of 1969, entitled to Social Security disability benefits.

/s/ Robert M. Wenzel

Robert M. Wenzel
264 50 3342
September 30, 1995

Correction and Amplification:

Judge Yim's pages have been put under the glass. It can be reasonably expected that mine will be. Thus this one.

1988 Disability Report, p. 5, part v: my stint at Honolulu City Hall recalled herein (p. 3, para. 4) was not in '88 recalled. I have no records of my employment from 6/78 to 3/80. The terminal dates are accurate because I have referencing VA letters; all between are approximations.

Ibid., Attachment, p. 2, para. 2: my stay at the Army hospital in Japan was closer to two weeks than "six weeks." I have no records from the Army hospitals – I was informed at Pensacola that all were lost. The Pensacola Narrative mention of three Army hospitals does not include the Saigon facility, the three and the one being the "four" mentioned in this narrative (p. 1, para. 3).

I do not have the Tripler Narrative. The extracts herein are reproductions from the Hearing Decision. If there is herein any variance from the narrative itself, it is variance made by Judge Yim.

Being a September 30, 1995 Petition

* * *

To: Appeals Council
Office of Hearings and Appeals, SSA
5107 Leesburg Pike
Falls Church, Va. 22041-3255

From: Robert Marshall Wenzel, 264 50 3342
1162 Spanish Armada Road
Las Vegas, Nv. 89123

For: an ordering of the Reopening of the Decision in my case or an Extending of the Time for Filing an Action in a Federal District Court

* * *

An Appeals Council, on October 2, 1974, concluded that the denial of my disability in ALJ William H. Yim's May 21, '74 Hearing Decision was "correct." I did not file a timely action in a Federal district court.

The administrative law judge, in his Hearing Decision, set forth school attendance as "a measure" which indicated "non-disability." I did not then know, did not until after I had finished school, that the judge had expressly, had openly, infringed a certain section in administrative law.

I continued school attendance for the next five years. I did not file a timely action because I believed that what a judge said, this and all else unreservedly affirmed by an Appeals Council, was to be believed.

I ask that you consider, reference the Code of Federal Regulations, whether this action was misleading. I submit that this was good cause for my not filing a timely action.

I ask that you consider, reference the United States Code, whether this Hearing Decision, one an Appeals Council "carefully considered" "correct," is, in and of itself, conclusive evidence of error on the face of the evidence, of error *plainly intentional* – of gross abuse of discretion.

I ask that you consider, reference the Constitution of the United States, whether I was denied due process of law.

I declare, under penalty of pertinent law, that I have made a true representation to the Appeals Council.

/s/ Robert M. Wenzel
Robert M. Wenzel
September 30, 1995

Enclosures

ALJ William H. Yim's May 21, 1974 Hearing Decision Appeals Council's October 2, 1974 Action My September 30, 1995 Narrative My 1962-63 and 1967-68 service records

1162 Spanish Armada Road
Las Vegas, Nv. 89123
January 8, 1996

Special Assistant to the President for Cabinet Affairs
Lee Ann Inadomi
Cabinet Affairs Room 160
Old Executive Office Building
Washington, D.C. 20500

Dear Ms. Inadomi:

I am Robert Wenzel. I will very much appreciate your contemplation of the particulars of my situation with the Social Security Administration. I write to you because of this particular: the three-year-long and continuing under-color-of-law flouting of law, its letter as baldly as its spirit, in the SSA's refusal to acknowledge a self-evident gross abuse of discretion in the denial of my disability.

My disability, SSA officials would have it understood, does not matter. Their judge's denial, *openly intentional* error on the face of the evidence, does not matter. Their Appeals Council's sustainment, affirming either a conniving or a rubber-stamping, does not matter.

What matters, the officials would have it understood, is what "our records show": I did not, after the AC action, file a timely court action. While there can be "good cause" for not doing so, my cause is not about to be seen as good.

What mattered, three years ago, if the reflex-response No in bureaucracy's standard-issue hideboundness needed any stimulation, was the somewhat unhappy prospect of having to face up to what in fact "our records show": a self-evident deprival of due process of law.

What matters, just now, is that to say Yes would be to acknowledge both this and more.

What mattered and matters is face-saving, now running to okole-covering. There is now in what "our records show" a three-year-long record itself in fair need of some cover. It can be reasonably expected that these SSA officials will continue, without an assisted activation of some faculties, to see nothing and hear nothing – will speak nothing but No.

I will very much appreciate your help in bringing this state of affairs to an end. Thank you.

Sincerely,

/s/ Robert Wenzel

Robert Wenzel

Attachment
to January 8, 1996 letter to Ms. Lee Ann Inadomi
Special Assistant to the President for Cabinet Affairs

The calling up of "cover-up" is very often no more than some buzzing about. Here? All, I believe you will agree, turns on whether I have been, since my injury, by the letter of the law, disabled.

There are, concerning a consideration of the impairment of pain, four matter-of-record conditions that imply it. There is one that infers it. There is, since my injury, my medical record of associated signs, symptoms,* and findings. This record is unequivocal.

What can be said, in answer, by officials of an agency that dutifully grants disability status to a number of those without one matter-of-record condition; in fact some without one apparent sign, demonstrable symptom, or medical finding, is for these officials to say.

There is, concerning a consideration of the listed impairment of chronic venous insufficiency, what is a matter of record; what has been, since my departure from Bethesda, plain to see; what is established – unwittingly to be sure – by an SSA judge in his 1974 Hearing Decision.

What will be said is No: there was in '74 in 20 CFR one group of signs associated with chronic venous insufficiency; there was in the grouping "extensive brawny edema," one sign there is no discovery of in the Hearing Decision; therefore: there is no establishment of chronic venous insufficiency in the Hearing Decision.

SSA sorts signs (the regrouping first appeared in the '94 edition of 20 CFR; it reappears, verbatim, in the '95):

> 4.11 Chronic venous insufficiency of a lower extremity. With incompetency or obstruction of the deep venous system and one of the following:

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* "Symptom" is, both in medical and general dictionaries, a synonym of "sign." It is, for the SSA regulation-writers, "your own description of your physical or mental impairment."

A. Extensive brawny edema;

OR

B. Superficial varicosities, stasis dermatitis, and recurrent or persistent ulceration which has not healed following at least three months of prescribed medical or surgical therapy.

"Edema" is, by definition, a condition that results in a swelling. It is, for SSA, the swelling. One of the signs, "recurrent or persistent ulceration," is one of the results of the swelling. It is, at once, an abating of the swelling.

What will be said is No: what the SSA says now (is now, well into its second half-century, aware of) cannot be used in place of what it said then. What can be recognized with a call on common sense – that the more frequent the discharges, all else held fast, the less the measure of that discharged, now and then and ever, will not matter.

"What will be said," none of which has been said to me, is here postulated as about the only thing that can be said. What would be said, ordinarily, would be along these lines: early on there would be the thoughtful allowance that I may have been, at the time of my Hearing, marginally disabled; shortly after there would be the regretful invoking of the nature of things: judgment calls have to be made; that is, after all, the reason why there are SSA judges.

There is good reason indeed why this will not be said. It is, moreover, the reason why there is no need, after all, for a wrestling of signs, symptoms, and findings, and 20 CFR to the medical-and-legal-erudition deck.

There is this: if I was not, in 1974, in law, disabled, if all that was needed for the denial of a certain listed impairment was the absence of one of its signs, why did the SSA's judge, this after right considerable else, find it necessary to evade, alter, synonymize, and expunge a number of its signifying words and terms? Why did he, after this and much else, yet find it necessary to contrive a patently illicit "measure" of "non-disability" – to fabricate law?

This is the signal reason why what has been said to me, over the past three years, does not come near stock answer; does not, thoughtfully, touch on what has been shown in what has been "answered." My Narrative will not be touched with a 10'-pole – its very existence will not be acknowledged.

How can it be that SSA's officials can, with well-nigh utter impunity, openly disregard, that is, flout, just about all law? Because in their offering there is this: that when deadlines have been missed there must be shown "good cause." Because this can be their most-any-cause-will-suffice clause or their saving clause. Because, crucially, the courts allow the SSA to be the sole interpreter of what is "good cause."

"Good cause," that is, is what SSA officials say it is. My cause for Yes is not to be as good as their cause for No. Interpretation, in the nature of things, is, after all, all.